

South African Human Rights Commission Equality Report

**Commentaries on Equality:
Race, Gender, Disability and LGBTI Issues**

2012



SAHRC
33 Hoofd Street
Braampark Forum 3
Braamfontein
2198

Tel: 011 877 3600

Private Bag X2700
Houghton
2041

Website: www.sahrc.org.za

E-mail: info@sahrc.org.za

Copyright in this volume is vested wholly in the South African Human Rights Commission.
No part may be reproduced without permission from the Commission.

South African Human Rights Commission Equality Report



TABLE OF CONTENTS

ACKNOWLEDGEMENTS..... 2

FOREWORD..... 5

INTRODUCTION 6

RECOMMENDATIONS: A SNAPSHOT..... 8

On Racism.....8

Gender Equality.....8

On Disability.....8

LGBTI Rights.....9

RACE AND EQUALITY IN THE COUNTRY: A SELECTIVE TRAJECTORY 10

Introduction..... 10

The Skierlik informal settlement: Research findings 11

The University of the Free State incident..... 14

Equality Courts..... 18

The National Action Plan to combat racism, racial discrimination, xenophobia and related intolerance..... 19

Conclusion 21

GENDER EQUITY IN THE WORKPLACE: 22

Introduction.....22

Methodology and Approach.....23

Gender Equity in the Workplace: Brief Overview of Current State of Affairs26

CGE Employment Equity Hearings: The Findings.....27

Conclusion31

Recommendations for Policy Action32

DISABILITY AND EQUITY IN SOUTH AFRICA 33

Introduction.....33

Promoting disability rights in a democratic South Africa35

Challenges in achieving equity for disabled people37

South Africa as a world player in issues of disability equity..... 41

ADVOCATING FOR EQUALITY IN ACCESSING LIVELIHOOD ASSETS FOR DISABLED YOUTH 43

Abstract.....43

Introduction.....43

Methodology.....44

Results.....44

Discussion46

Conclusion and strategies for action47

TWO STEPS FORWARD, ONE STEP BACK: EQUALITY AND SEXUAL ORIENTATION IN SOUTH AFRICA 2009 – 2011..... 49

Introduction.....49

Concepts and Definitions.....50

Responses to infringements of rights: Localised organisation around “corrective” rape 58

Conclusion60

Recommendations.....60

CONCLUSION 62

ACKNOWLEDGEMENTS

The South African Human Rights Commission (The Commission) would like to express its gratitude to all the authors who gave up their time to contribute to the publication of this report. A sincere thank you to Dr. Kgamadi Kometsi of the Commission for coordinating the writing and editing of this report.

Dr. Kgamadi Kometsi (Report convenor, content reviewer and editor)



Kgamadi Kometsi is a Clinical Psychologist, with a background of teaching both at the universities of Cape Town and Witwatersrand. His research interests include race, racism, racial identities, gender, sexualities and HIV and AIDS. In particular, he is interested in using the psychodynamic lens to explore social dynamics in relation to these fields of interest. Having completed an interdisciplinary PhD at WISER, Wits, in 2008, he has presented widely, both locally and internationally on race, discrimination and human rights, and has published in peer reviewed journals on these subjects and on transformation. He currently occupies the position of National Coordinator for the Portfolio of Racism and Non-Discrimination at the South African Human Rights Commission (the Commission). His major project in this role has been to represent the Commission as part of the National Forum Against Racism (NFAR) to develop the National Action Plan to combat racism, racial discrimination, xenophobia and related intolerance (NAP). He has also presented as part of the United Nations' training initiatives in international workshops meant to assist countries which are still in the process of developing the NAP.

Cameron Lee Jacobs (Co – editor)



Cameron Lee Jacobs is the Acting Head of the Research Programme of the South African Human Rights Commission. He specifically leads, manages and ensures the effective coordination of the strategic objectives of the Research Programme. This primarily entails the production and publication of the Economic and Social Rights Report, the Equality Report, the Strategic Focus Area Report, the monitoring and evaluation of past recommendations and serving as a support function for the legal, advocacy and communication activities of the Commission. He holds a Sociology Honours as well as an MPhil degree in Public Policy from the University of Cape Town and has a background in law. In 2009, he published a book on land tenure reform in South Africa. His research interests include land reform; developing indicators for economic and social rights; culture and identity and; social relations in the agricultural sector.

Dr. Thabo Rapoo



Thabo Rapoo is a policy analyst and research specialist on democracy and governance. He holds a PhD in Social Science from the University of the Witwatersrand, an MA in Sociology of Development from the University of the Witwatersrand and an MA in Social Science from the University of Glasgow in Scotland, United Kingdom. He is currently Head of Department for Research at the Commission for Gender Equality. Previously he has held the position of Executive Director at the Centre for Policy Studies where he worked for more than thirteen years; Head of Research at the Gauteng Provincial Legislature; and Research Manager at the Centre for Public Service Innovation (Department of Public Service and Administration). He has published widely and presented seminars in the areas of democracy and governance in South Africa.

Ms. Vernet Napo



Vernet Napo was appointed in the Commission for Gender Equality as Deputy Director for the Department of Research in September 2006. She has extensive experience in working in the education sector, firstly as an educator, then from 1987 to 1998 as a Subject Adviser: Geography, in the Gauteng Department of Education (GDE); and finally as a Gender Focal Person (1998-2001). Between 2001 and 2005 she worked at the Centre for Education Policy Development (CEPD) as a Researcher. Vernet holds a Masters Degree in Education from the University of Witwatersrand. She has publications on Gender and Education.

Prof. Leslie Swartz



Leslie Swartz is a Clinical Psychologist and a Professor in Psychology at Stellenbosch University. He obtained his PhD in Psychology at the University of Cape Town in 1990. He has published widely in the field of disability studies, mental health, and community psychology. He is associate editor of the journal *Transcultural Psychiatry*, and editor-in-chief of the *African Journal of Disability*. Recent publications include *Disability and International Development* (co-edited with Mac MacLachlan) (Springer, New York), and a memoir dealing with disability issues in southern Africa, *Able-Bodied: Scenes from a Curious Life* (Zebra Press, Cape Town). Current projects include work on access to health care for disabled people in four African countries; improving language access to health services, with a focus on people with psychiatric disability; training members of disabled people's organizations in southern Africa in basic research skills; and diversity training for educators in the higher education sector.

Prof. Theresa Lorenzo



Theresa Lorenzo is Associate Professor in the Department of Disability Studies and Occupational Therapy, which forms part of the School of Health and Rehabilitation Sciences, in the Faculty of Health Sciences, at the University of Cape Town. She gained experience in community-based disability and development programmes in the rural communities of Limpopo and Mpumalanga, which included the pilot training of community rehabilitation workers. She joined UCT's Occupational Therapy Department in 1996 and established a partnership with the SACLA Health Project in Khayelitsha and Nyanga in building the community's and students' capacity to work with civil society organisations in addressing the needs of disabled people and their families. Her research has covered evaluations of Community Based Rehabilitation programmes in different SADC countries. She has done participatory research on community disability entrepreneurship groups and community rehabilitation worker training. Her PhD focused on how disabled women participate in opportunities for their social and economic development. She currently leads a collaborative study with occupational therapy departments from five universities in South Africa exploring the strategies of disabled youth in sustaining their livelihoods. She initiated the Disability Studies Postgraduate Programme at UCT in 2003 that aims to build leadership capacity to facilitate the implementation of policies that creates a disability inclusive society and bridges the gap between activism and scholarship.

Mr. Pierre Brouard



Pierre Brouard is the Deputy Director of the Centre for the Study of AIDS (CSA) at the University of Pretoria and is a registered Clinical Psychologist. He has worked in HIV since the mid 1980's and at the CSA for ten years. His interests include sexualities, gender, human rights, stigma, governance, leadership, accountability, structural drivers of HIV, HIV prevention, and psychosocial and care issues. At the CSA his work includes consulting, training, lecturing, project management, research, writing and materials development. His work with the Centre for Human Rights at the University of Pretoria has included teaching on courses on gender and sexual minorities, and he sits on the board of the Tshwane-based Human Rights Development Initiative.

Mr. Jimmy Pieterse



Jimmy Pieterse is a lecturer in the Humanities Faculty of the University of Pretoria and a research-collaborator at the Centre of the Study of AIDS at the same institution. He is currently reading towards a PhD in Anthropology and his research interests include HIV and AIDS, gender and sexuality.

FOREWORD

The Commission, as an institution supporting constitutional democracy in South Africa, is obligated to report on the country's progress made towards the attainment of equality in respect of the national legislative framework. The Commission is also guided by the responsibilities as set out by the Paris Principles governing the functioning of national human rights institutions internationally.

The Constitution of the Republic of South Africa, (Act 108 of 1996) and the Promotion of Equality and Prevention of Unfair Discrimination Act, (Act N0 2 of 2000) make specific provisions regarding the role of the Commission and its reporting obligations, particularly on the state of equality in the country.

Internationally, the government of South Africa has an international obligation to report to specific and different United Nations structures and committees on the progress achieved or otherwise on the elimination of discrimination and the promotion of human rights. The Commission, in the spirit of cooperative governance, assists in compiling the relevant United Nations reports while at the same time reserving the right to submit shadow reports in instances where it does not agree with the government on specific matters dealt with in a particular report as part of its monitoring mandate.

South Africa is characterized by a tragic history of oppression, exclusion, dispossession and the selective advancement of certain groups above others, in particular, the black majority. The institutionalized policies of segregation and apartheid resulted in the systematic discrimination and exclusion of the black people in all facets of economic, political and social life.

Although race was indeed the predominant fulcrum of the oppressive system of the past, racial oppression and exclusion were not the only evils, which rendered millions of people sojourners and second-class citizens in their own country. Amongst others, the ideology of patriarchy, and its concomitant paternalistic practices wreaked havoc on women and others, resulting in considerable effects of vulnerabilities, both for women and those who did not conform to the script of white masculinity as was ascribed to them.

Given this history, it is axiomatic that equality became one of the fundamental values of South Africa's Constitution and section 9 of the Bill of Rights provides for equality before the law and equal protection of the law, freedom from unfair discrimination, positive measures to advance equality and further provides for the equal enjoyment of all other rights and freedoms.

It is therefore with great pleasure that I present this inaugural Equality Report and commentary on the state of equality in the country.

Yours faithfully



Advocate M.L. Mushwana

Advocate M.L. Mushwana
Chairperson, South African Human Rights Commission

INTRODUCTION

Alongside human dignity and the advancement of human rights and freedoms, equality forms part of the very first founding provisions of South Africa as a constitutional democracy. It is listed in the Constitution of the Republic of South Africa (the Constitution), as part of the non-derogable rights, which prohibits the unfair discrimination on the basis of race, colour, ethnic or social origin, sex, religion or language. There are several conceptions of equality, the most important of which are broadly covered in the concepts of 'formal equality' and 'substantive equality'. Formal equality refers to the basic idea that individuals in like situations should be treated alike. However, this overlooks the importance of context where there are individual differences.

It is the explication of substantive equality, which is particularly instructive for the current report. Substantive equality refers to the notion that individuals in different situations should be treated differently, focusing on the equality of results, and equality of opportunity. The history of this country, as described in the Foreword, resulted in a broad categorization of people as privileged and disadvantaged. As a means to undo the legacy of past discrimination, a legislative framework in the form of the Constitution and relevant legislation, particularly the Promotion of Equality and the Prevention of Unfair Discrimination Act (PEPUDA) and the Employment Equity Act, amongst others, were promulgated. As part of its constitutional mandate to promote respect for human rights, to promote protection for human rights and to monitor the observance of human rights in the country, the Commission is obligated through PEPUDA, to provide a report to Parliament, providing an assessment on the state of equality in the country. In compiling this report, the Commission is enjoined to consult with the Commission for Gender Equality (CGE), particularly given that one of the major aspects the Commission has to report on is the state of gender equality in the country.

Unfair discrimination is prohibited in South Africa. Both the Constitution (Section 9(3)) and PEPUDA (provision 1 dealing with Definitions) provide a list of prohibited grounds. These are:

- a) Race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or an
- b) Any other ground where discrimination based on that other ground
 - i) causes or perpetuates systemic disadvantage
 - ii) undermines human dignity; or
 - iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground listed (above)

The subsection b) above represents an extension found in PEPUDA, ensuring that other forms of unfair discrimination with effects similar to the grounds listed in the Constitution are covered too. The current report, as prescribed in PEPUDA, focuses on three of the dimensions of unfair discrimination, namely racial discrimination, gender equality and discrimination on the grounds of disability. Given the prominence of violence against lesbians in black townships during the period under consideration, as well as the rigidifying and recalcitrant negative attitudes in society against members of the LGBTI community in general, this report includes a chapter on this aspect as well. The Equality Report as prescribed by the law can only be written once the necessary regulations have been put in place. The current report represents a proactive measure by the Commission, providing a commentary and basis on which the anticipated report as prescribed in PEPUDA will be mounted. It provides both a broad and selective focus on those developments which provide some insight into the state of equality in the country. To this extent, authors who are specialists in the specific areas of interest were invited to contribute chapters, with guidelines provided by the Commission.

The first chapter, dealing with racial discrimination provides what the author refers to as a selective trajectory, looking at a combination of research done by the Commission in a disadvantaged community; the intervention the Commission mounted in restoring dignity for those whose rights have been violated; the fact that South Africa does not have an adopted national action plan to combat racism years after the World Conference Against Racism; and the monitoring of Equality Courts as instruments of access to justice as provided for in PEPUDA. The argument that the author conveys, is that certain spatialities still allow for the occurrence of crude racism to occur, in a context where instruments that are meant to

assist members of our society to assert themselves against discrimination and access justice, are either poorly functioning or are not in place.

This chapter is followed by the chapter contributed by the CGE, focusing on the public hearings it held during the course of 2010/11. Part of what motivated this process was the fact that reports compiled by the Commission for Employment Equity have shown consistently, that both the public and private sectors seem to be struggling with ensuring that women are adequately represented at all levels of employment. This chapter advances the argument that in spite of the commendable legislative developments in ensuring that gender equity is attained in the workplace, the reality on the ground falls short of these legislative developments and provisions.

Two chapters on disability have been included in this report. In part, this is informed by the ongoing challenges which people with disabilities face on a daily basis, impacting negatively on their quality of life, and depriving society of the contribution that people with disability are willing and able to provide. The first chapter, which leans more towards a conceptual realm, draws focus towards the medical and social models of disability, highlighting the obstacles that society puts in the way of ensuring that people with disabilities are fully functioning members of society. The second chapter presents a more quantitative report on the research project focusing on youth. Given the growing concern about youth and unemployment in general, this chapter is crucial in that it focuses on the unemployment challenges which young people with disabilities face on a daily basis, and the dynamics caused by the disability grant in this context.

Lastly, the chapter dealing with the challenges faced by the LGBTI community in South Africa brings focus to a sector whom Albertyn, Goldblatt and Roederer (2001, p. 39) referred to 'as a permanent and political minority that has suffered patterns of disadvantage in the past and is reliant on the Bill of Rights for protection'. This chapter removes the silence in relating the violence suffered by members of this community, pointing out where things need to be changed to stop the fatalities and to end the violence directed against all members of this community.

Each of the chapters contains both a conclusion and recommendations. However, the report opens with a list of recommendations, foregrounding these as particularly important for implementation. It ends with pulling the report together in a final concluding chapter containing recommendations which the Commission would like the National Assembly to consider for implementation.

In publishing this report, the Commission wishes to emphasize that the content does not represent positions of the South African Human Rights Commission, but views which the Commission believes should inform public discourse on human rights.

RECOMMENDATIONS: A SNAPSHOT

On Racism

- Conversations dealing with injustices of the past should continue at different levels of society, culminating in a national dialogue bi-annually. This has to be made a permanent feature of government events calendar, given centuries of problematic race relations in the country
- Every institution, organization, company or business serving or interacting with members of the public should have an anti-racism policy. This may be included as part of the legally required equality plan for some institutions and government departments
- Equality Court matters, processes and outcomes should be made public as part of promoting the work of Equality Courts
- Where possible, Equality Court Clerks should not carry an amount of responsibilities which would distract them from focusing on the work of Equality Court
- The finalization and implementation of NAP has become an extremely critical matter, and government should give this top priority. The NAP is a policy document, a programme of action with clear stipulations on how to implement it, those responsible for the implementation, monitoring and reporting

Gender Equality

- There is a need to improve and strengthen the capacity of the National Gender Machinery to monitor and oversee public and private sector efforts towards gender transformation in the workplace.
- The institutional capacity of the Commission for Gender Equality should be strengthened, sharpening its legal authority to make binding interventions, and placing greater emphasis on its visibility as an institution driving the national agenda for gender transformation.
- Commission for Gender Equality, in collaboration with the Department of Labour and other relevant role-players including the South African Human Rights Commission, should urgently convene a national consultative conference of stakeholders to discuss the challenges facing the implementation of EEA and other relevant policies and laws; and to forge effective consensus on the best joint strategies and implementation programmes to prioritize and promote gender transformation in the workplace.
- The Department of Labour and the Employment Equity Commission should review, and if necessary, revise current Employment Equity reporting systems for employers, placing greater emphasis on standardizing requirements for accurate information, with rewards and incentives for compliance and severe penalties for non compliance.
- The Department of Labour, EEC and the Commission for Gender Equality should ensure the strengthening of current mechanisms, processes and procedures for reporting sexual harassment in the workplace.

On Disability

- Government and relevant role-players should identify and eliminate barriers that have adverse impact on designated groups
- A strengthening of measures which promote diversity is essential

- Employers and society in general should make reasonable accommodation for people from designated groups, particularly for people with disabilities by providing preferential treatment and numerical goals to ensure equitable representation.
- Employers should put measures in place for the retention, development and training of designated groups (including skills development)
- Stakeholders and relevant role-players should build a strong evidence-base by documenting effective practice that informs policy processes so as to familiarize government and policy makers with specific inequities faced by disabled youth.

LGBTI Rights

- At the individual level, it is important to create a cadre of LGBTI activists who are confident, informed and politically engaged. They act as role models for other LGBTI people, especially the youth, and challenge attitudes and perceptions held by the rest of the society.
- At the social level, stigma and discrimination need to be challenged in all institutions of influence (in schools, faith-based organizations, cultural bodies and the media, locating this work in a social-justice framework and the values of the Constitution.
- Discourses around sex, sexuality, sexual orientation and gender need to be examined and opportunities created for the promotion of a national discussion around rights, development and sexual and gender justice.
- At the systematic level, there needs to be a well funded and supported LGBTI sector, as well as alliances between LGBTI organizations and all the other human rights organizations and defenders. All government departments (but especially those representing the criminal justice system) need to be held to account by, and work with, NGOs and rights defenders (including Chapter Nine institutions), commit to processes and policies which uphold the laws of the country. Social upliftment programmes, and economic policies which build a more equal society, can address the grinding poverty which enables some of the excesses of discriminatory practice.
- Training of the civil service on issues around diversity, commitment to building greater consensus with government about the value of addressing LGBTI rights, and a meaningful commitment to an inclusive national identity, can help make the constitutional equality provision a reality rather than an ideal.

RACE AND EQUALITY IN THE COUNTRY: A SELECTIVE TRAJECTORY

Dr. Kgamadi Kometsi:

National Coordinator: Racism and Non-discrimination
South African Human Rights Commission

Abstract:

South Africa has had a particularly interesting relationship with the concept of race and the ideology of racism. This chapter addresses four different aspects on the subject of racial discrimination in the country commencing with a conceptual orientation, and shifting towards a more applied focus in the latter part. Following an introduction which provides a context for the currency of racism in the country, the chapter discusses the meaning of the Skierlik shooting incidence for efforts to combat racism, illuminating conditions which are associated with the eruption of racial violence.

A conceptualization and exploration of the South African Human Rights Commission's work relating to the University of the Free State (UFS) racism incident follows, pointing to the suffering caused in this case, and highlighting reconciliatory possibilities for the way ahead. This is followed by a discussion on the development of the national action plan (NAP) to combat racism, racial discrimination, xenophobia and related intolerance, highlighting the work that the Commission has done to advance the development of the NAP as part of international best practice. Finally, the chapter turns to a narrative of equality courts, which the Commission monitored in the nine provinces of South Africa during 2011.

Introduction

Racism has been a problem in South Africa for over three centuries. The violence of colonialism initially, and the subsequent ideology of apartheid, have been blamed for the atrocities which have been committed in the name of race, and the false belief in white superiority. South Africa continues to battle socio-economic inequalities, which are largely the legacy of these historical processes. In essence, the significant transition which took place in the early 1990s, and culminated in the first democratic elections in 1994, was primarily a transition from white rule, which was characterized by laws that discriminated against black people, and privileged white people.

The 1994 election itself, and the subsequent process which finalized the constitution on which this country is founded, were important milestones against the terror and oppression of racism, ushering in an era in which racial equality would be an important and founding value for the South African nation going forward. Following the protracted struggle against racial oppression, and the advent of democracy, there are a few distinct processes, which South Africans have mounted in an attempt to deal with the problem of racism, and its legacy. These, in no particular order, are the first democratic elections of 1994, the Truth and Reconciliation Commission process, the national conference themed Combating Racism: A nation in Dialogue (2000), and the hosting of the World Conference Against Racism (2001). In addition to these, there has been a concerted effort in different sectors of society, to engage in discussions about racism. The Apartheid Archives project, the Revisiting Racial Classification Categories conference (both the University of the Witwatersrand initiatives) and the ongoing efforts and activities at the University of Cape Town to redress racial inequality in their admission processes, as well as other initiatives indicate the strides that South Africa has made to overcome racism. During each of these processes and events, there are attempts to provide an evaluation both of the consequences of discrimination and the panaceas to undo the legacy of past injustices. For instance, the Truth and Reconciliation Commission process provided the following synopsis in terms of where the country was at the time in respect of dealing with past injustices of racial discrimination:

There were cases in which people were victims of racist attacks by individuals who were not involved with a publicly known political organization ... Although racism was at the heart of the South African political order, and although such cases were clearly a violation of the victim's rights, such violations did not fall within the Commission's mandate. (TRC Report, Volume 1)

This statement is important to the extent that it maps out what aspects of racial discrimination fell within the mandate of the TRC. By implication, this statement outlines the magnitude of the problem of racial

discrimination, which remained untouched, at least by the formal efforts to deal with the impact of racism under colonialism and that which was brought about by the ideology of apartheid. It is against this background that in the last few years some commentators have appraised this conundrum, which lies outside of the political motivation as envisaged in the TRC report as follows:

For South Africans, racism represents the most frightening ghost. It cannot merely be viewed as an unfortunate historical phenomenon. Admitting how it has influenced each one of us matters (Mamphela Ramphele - Laying ghosts to rest, p. 73)

Even if we wish to deny it, race hovers not far from the surface in private or other everyday settings: as an unspoken presence, a (wrongly) perceived absence or as a painful, confusing, liberating or oppressive reality in social, economic or other – more intimate – interactions between individuals or between groups of individuals. In South Africa we (still) cannot escape race – (Pierre de Vos, Blog)

These captions clarify both the recalcitrance and the complexity of racism, and therewith the amount of effort it would take to undo the legacy of this 'ghost'. They also suggest the pervasiveness of racism (and its influence) in spite of the commendable strides South Africa has made in its eighteen years of democracy. Given these considerations, this chapter focuses on two different incidents, which serve almost as a barometer of where the country is in regard to race relations. The discussion of these events is followed by two practical measures, which are meant to assist in the efforts to combat racism and restore the dignity of its victims. One is an aspect of national legislation, which provides for victims of unfair discrimination to access justice; and the other is an example of international best practice, intended to be a policy statement, committing United Nations member states to mounting efforts to fight racial discrimination and related intolerance.

The Skierlik informal settlement: Research findings

On the 14th of January 2008, Jozef Johannes Nel drove to the Skierlik informal settlement, where he shot and killed 4 people, including a two month old baby, wounded eight and shot and missed 3 others. He was arrested and found guilty of a racially motivated murder; and he was sentenced on the 21st of November 2008. The Commission, through its Research Documentation and Policy Analysis Programme, undertook an ethnographic visit to the greater Swartruggens area following several meetings, which were held with some of the stakeholders in Swartruggens. During the meeting of 20th August 2009, the Commission communicated a proposal regarding a research project, which would take the form of an ethnographic visit. This was received positively by all who attended the meeting, amongst whom were representatives from the Premier's office, the local council, emerging farmers, agricultural sector, churches, schools and the local court. What consistently emerged in these meetings, were the ongoing complaints about service delivery in Skierlik, the victims of the shooting incident who had remained traumatized and uncounselled, and reports of ongoing racial tensions. Some of the concerns, which were raised, were sector specific, such as the safety of farmers and their families, jobs for the unemployed youth, and interventions needed against poverty.

For the purposes of this chapter, the research findings are used to make comments about both the particular research site, and other places in South Africa with similar characteristics (small towns, lack of employment opportunities, predominance of unskilled labour businesses, forced relocations and the attendant emergent informal settlements, amongst others).

The main rationale for embarking on this project was to ensure that the Commission would have a more systematic and sustained engagement with the challenges of the community of Skierlik, and the greater Swartruggens area. Given that the main problem related to racism, and the trauma which followed was triggered by the racist shooting of people in Skierlik, care had to be taken to improve the reliability and quality of the information on which the Commission's intervention would be founded. It is believed that comparatively speaking, having a sustained exposure to a community as compared to occasional meetings puts researchers in a better position to learn about the dynamics of a given community, as well as to glean information that would improve successful outcomes for a planned intervention.

With this in mind, the following is a summary of the findings based on the ethnographic visit to the greater Swartruggens area. However, to appreciate the full picture emerging out of the findings, the

reader is encouraged to read the summary in conjunction with the full report, which is available on the website of the Commission (www.sahrc.org.za). It is also important to note that aspects of this summary were presented to stakeholders in the Skierlik-Swartruggens area, to facilitate discussion. This served as a built-in mechanism to ensure response towards the broader findings of the report, and for stakeholders to contribute, specifically in regard to recommendations that would be more germane to the specific challenges faced by the greater Swartruggens area. The findings are paragraphed in terms of five themes, which are auto-ethnographic in nature. The themes cover a discussion on variable experiences of racism depending on one's position vis-à-vis the occurrence of racism, perceptions on the justice and policing systems; reading the problematic everyday; the role of poor service delivery in exacerbating the plight of the disadvantaged; and the absurdities which have infused themselves in the social fabric of our communities. These are discussed after the brief reference to the ensuing description of information sources.

The ethnographic visit findings are based on interviews that the researcher conducted with selected people in the greater Swartruggens area. The interviewees were carefully selected so as to shed light on the broader views held by their respective constituencies regarding race relations in Swartruggens, as well as their reflections on the Skierlik shooting. The information was also based on several community meetings that the researcher attended, where community members expressed the challenges of living in the greater Swartruggens area and within the broader Kgetleng Municipality. One such meeting was organized by the Congress of South African Trade Unions (COSATU), at which some of the local offices of government departments (Social Development and Labour) were in attendance. Further, the researcher gleaned some of the information from observation and informal discussions with the residents of the greater Swartruggens area.

The dynamics of positionality

In spite of the abominable nature of the Skierlik shooting incident, there were people from the surrounding townships in the greater Swartruggens area, who felt that it was *not that bad*. This is contrary to the perceptions that intolerable levels of racism pervade all areas of life in this place. The finding brought attention to the fact that how one sees the degree of racism is related to where one is positioned in relation to the occurrence of racism. For instance, it would not be surprising to hear about the perpetual nature of racism from the residents of Skierlik, given their intimate experience of the shooting incident. The statement that *it was not that bad* should not be read as denying the existence of racial prejudice in the greater Swartruggens area, because indeed, everyone that we came into contact with confirmed the existence of racism. Rather, it is its intensity that is experienced differently by different people, painting a more complex picture, which requires a more sophisticated reading in order to accommodate the multiplicity of voices and experiences.

Justice and Policing

In regard to how these services interacted with reports or complaints of racism, it is worth noting that Johan Nel (the teenager who was convicted for the shooting) was indeed apprehended by the police in this area, and was convicted by the local court. However, observations were made that where complaints might have been lodged as related to racial prejudice, the mechanisms of the system were such that it was possible for the accused to plead guilty for a less serious charge of assault, without the aggravating qualification that the assault could have been racially motivated. The accused then gets an option to pay a fine of R100 on average. In terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA section 28 (1)):

If it is proved in the prosecution of any offence that unfair discrimination on the grounds of race, gender or disability played a part in the commission of the offence, this must be regarded as an aggravating circumstance for purposes of sentence.

Although paying a fine is a legitimate option when the court rules in this way, the perception that the exercise of this option creates in the greater Swartruggens area is that perpetrators of racism manage to get away with very little punishment. In turn, this discourages reporting incidents of racially motivated violence. To deal with these perceptions, there were feelings that court decisions should be made more public and detailed, and that members of society, especially those who have laid complaints, should be encouraged to attend court and observe the court process for themselves. The expectation was that this would deal with the negative perceptions of the court system, while at the same time it would provide an

opportunity to witness the law dealing with race-related transgressions, dispelling perceptions of impunity for those who are found guilty of racially motivated violence.

Other challenges that were raised in this sector, and which were seen as militating against the fight to combat racism and racially motivated attacks suggested that there were times when the police were seen as being lenient to perpetrators of racially motivated violence, especially when perpetrators are white farmers. This is a particularly problematic perception, requiring urgent attention given that there was consensus in this sector that farm-workers were the most vulnerable group in the context of racially motivated attacks.

Proximity and the incredible distance

On the surface, social intercourse seems normal in Swartruggens. However, its racial ordering is unmistakable. Initially it looks normal perhaps because racially exclusive social interaction tends to be dominant in most similar urban spaces. The most telling symptom of the inequality in terms of how racial groupings are treated and responded to was found in a popular restaurant and some of the other businesses around town. Firstly, although members of different groups can dine in the same restaurant, the sitting preferences still evince separation along racial lines, with white people seeming to prefer a sitting that is as far from black people as possible. Given the adage that 'the personal is political', sitting preferences cannot be seen as divest of any political intention and strife. Whether conscious or not, an expression of preferences in social spaces betray the underlying political tensions, or harmony, as the case may be.

It was also at this popular restaurant where the song 'De La Rey' was played quite loudly, in spite of the fact that the majority of the patrons and workers at that point were black. Given the controversy that erupted following the publication of this recording, it is clear who this business establishment was trying to make comfortable and to attract. Afrikaans radio stations were also heard at other shops, to the apparent disregard of the black staff and customers who walk through the doors of these establishments. The operation of power in these spaces is clear, with the enjoyment of white patrons being foregrounded (a discussion on power follows below). Suffice to conclude this discussion of the 'proximity and incredible distance' by referring to the fact that social distance between the different racial groupings has become ingrained in the social fabric, and it goes much deeper than the readily observable and still remaining residential area distance, emerging in what we regard as benign personal choices. The use of cultural difference as an explanation for this social distance is at best disingenuous.

Service provision

The visit shed light onto the challenges with service provision faced by the greater Swartruggens area as a whole, regardless of race and residential area. In regard to the acknowledged needs of Skierlik as a community, what came out quite insistently was that there were other communities, which had been complaining about service delivery way before Skierlik was established. It was apparent that some of the community members felt that the shooting incident brought more attention to Skierlik, at the expense of other, similarly needy communities within this area. There were widespread reports of dissatisfaction against the Kgetleng Municipality in regard to Skierlik, Mazista and the greater Swartruggens area. In particular, the meeting held by COSATU during the course of the ethnographic visit unearthed a number of issues, which the Skierlik/Mazista community was experiencing. These include uncertainty about the future of Skierlik and labour-related difficulties (e.g. poor conditions of employment – safety concerns; irregular and exploitative remuneration, allegations of shop-stewards colluding with management against workers, etc.). At the time when the Equality Report 2010/11 was published, conditions in Skierlik had improved substantially, with most if not all the residents at the informal settlement, having moved to formal housing. This is one of the instances where the Commission, civil society, the different spheres of government, played their role in highlighting the challenges the Skierlik residents were facing, and acting to bring about a resolution thereof.

The absurdity of the everyday

As alluded to above, one of the findings which at face value does not present as an aberration until it is viewed through the lens of the legacy of apartheid is the racially exclusive nature of some church memberships, as well as certain cultural life-stage practices which fail to bring racially diverse groups together. For instance, in the black communities, one does not require an invitation to attend a funeral,

and similarly, no invitation is needed to attend a church service. These are open events, but they are still characterized by the social distance and racial exclusivity that was discussed above. In the context of the nation-building project, these tendencies of exclusivity create great concern at the very least, and every instance where this picture is disrupted represents a glimmer of hope. This is particularly the case when one has regard to the fact that some of the stereotypes that were characteristic of colonial and apartheid times are used to make sense of these exclusivities. For example, the racially exclusive nature of church membership is explained as being premised on the presumption of essential differences between races, in terms of what they can understand, enjoy as well as the matters to which they can relate. Even worse, the explanation that is used is that there are natural differences between the races, and as if to attempt to rely on the Bible, there was a belief expressed that there must be a reason why black and white were made different, 'justifying' therefore, the need to live and do things apart.

Crime perceptions and the Skierlik incident

Some of the participants expressed a feeling that when they were not at home, they feared for the safety of their families, especially their wives and children. There was a feeling that black criminals would attack their households, as they have allegedly attacked households of farmers in the area. There was also an interesting description of the unique criminal activities that betray the criminal as black. The white participants expressed the feeling that there was less attention given to the plight of white people in the area, both by the media and by the government, in a context where they felt under perpetual threat of attack. They felt that there was little or no compassion for white people as victims of crime. They also juxtaposed these feelings with the amount of attention that the Skierlik shooting incident evoked. Some felt excluded from expressing their compassion for the victims of the Skierlik shooting, and felt blocked from expressing this given the exclusive liberatory hue that the process around the memorialization of the Skierlik 4 took, as well as how events around the court process in this case unfolded. This carries an important consideration for similar memorializations in the future, to ensure that in a context where there are attempts at nation building and reconciliation, such memorializations should be done in an inclusive manner. Lack of this consideration serves only to deepen polarities between the different racial groups.

Power

In the greater Swartruggens area, as in other similar places in the country, class differences remain racialized, with white people being the dominant providers of employment for the 'unskilled' labour force (excluding the government). The domestic spaces, farms and the small (sometimes informal) businesses become secluded spaces where power is unleashed on the less powerful. Lack of adequate education, rife unemployment and poverty are some of the main causes of vulnerability in these spaces which make it difficult or even impossible for victims of abuse and exploitation to break free or challenge unfair practices. Perceptions of impunity on the part of perpetrators only serve to worsen the problem.

The University of the Free State incident

On the sixth of March 2008 the Commission received a complaint following an international dissemination of an extremely offensive racist video produced by four of the UFS students. The video depicts four white male students making the African employees (complainants) swallow a bottle of beer, run a race, play rugby and kneel and eat what looks like mince meat which had been urinated upon. Initially, the video shows one of the students urinating into the food before it was served on the unsuspecting five victims (four women and a man).

Criminal and civil cases were initiated in this regard, with the Commission opting to delay the onset of the civil case at the Bloemfontein High Court (Equality Court case) until the criminal case had been concluded. However, the Commission maintained a brief watch of the criminal proceedings, ensuring that it would be ready to launch the Equality Court case immediately thereafter.

This section focuses on the intervention, which the Commission, together with relevant stakeholders, mounted in the place of proceeding to the Equality Court. In evoking the conceptual framework of the TRC, it illuminates the importance of careful thought needed to ensure that the intricacies characterizing the fight against racism in a nation-building context are considered. The Commission accepts both the diversity and at times, the divergences of views in regard to this framework, both nationally and internationally. However, reconciliation as theorized and implemented by the TRC remains amongst the

most emulated examples of reconciliatory processes throughout the world. The section commences with a contextualization of why the TRC conceptualization is important for an intervention as carried out at the UFS. This contextualization is continued in the next two subsections, which deal with the importance of uncovering truth to promote recovery for victims of racial violence, as well as the positionalities of the perpetrator, the victim and the contexts in which the violence of racism takes place. In each of these subsections, reference is made to how it applies in the context of the UFS incident. Finally, the discussion provides a brief discussion on how this particular intervention may be carried forward into the future.

Painting the context

This incident of the University of the Free State, and the occurrences surrounding what the students maintained was a form of initiation into the Reitz hostel necessitates a reflection on the principles that underpinned the TRC and its processes.

As part of the introduction of the TRC report, Archbishop Desmond Tutu referred to the magnanimity with which victims, black and white, but predominantly black, have embraced reconciliation, instead of being consumed, justifiably so, by bitterness and lust for revenge. He reflected on this and appealed specifically to white South Afrikaners in the following quote:

Dear Fellow South Africans, please try to bring yourself to respond with a like generosity and magnanimity. When one confesses, one confesses only one's sins, not those of another. When a husband wants to make up with his wife, he does not say, "I'm sorry, please forgive me, but darling of course you too have done so and so!" That is not the way to reach reconciliation. That is why I still hope that there will be a white leader who will say, "We had an evil system with awful consequences. Please forgive us." Without qualification. If that were to happen, we would all be amazed at the response. (TRC Report, Volume 1, pp. 18 – 19)

The picture that is painted here is that of the larger section of Afrikaners not having embraced the process of reconciliation, at least during the time at which the TRC report volumes were published. In the Archbishop's reflection, there is a clear lament of a missed opportunity, with implications, which would necessarily require dealing with in the post-TRC South Africa. It is, in part, this missed opportunity, and its tendency to leave a gaping hole in processes of democratization and nation building, that informed considerations of the Commission in finding a way forward in regard to the UFS matter.

The significance of truth and the responsibilities/obligations this engenders

Still reflecting on some of the principles underpinning the TRC and its processes, the way in which 'truth' has been inserted in processes of reconciliation and transformation, it would seem that there is a close relationship between the acknowledgement of truth, and the onset of the repair process from a trauma that has been suffered. There is power in truth, a power that seems to halt even the most extreme effects of trauma. This sense is conveyed in Archbishop Tutu's introduction to the report of the TRC, where he quotes Ariel Dorfman's play where a female character who has managed to render powerless a man who has violated her, only gets to the point of refraining from killing him in vengeance when this man admits his violations. Judge Richard Goldstone expresses a similar view in stating the following:

While criminal prosecution is the most common form of justice, it is not the only one. The public and official exposure of the truth, especially if the perpetrator is a part of that process, is itself an important form of justice. Thus truth commissions or public inquiries share with criminal prosecutions the ability to bring significant solace to victims. Common to all forms of justice is public acknowledgement for the victims.

In this exposition, Judge Goldstone goes on to list four different advantages for exposing and recording the truth about human rights abuses. These are:

- The prevention or curbing of denials and revisionism.
- The prevention of recurrence.
- The removal of the perpetrators from public office.

- Individualizing the guilt of the perpetrators and thereby averting collective guilt being ascribed to groups.

In respect of the first advantage, dealing with denials only serves to promote the process of healing, for both perpetrators and the victims. In a context where the Reitz incident had gone beyond the locale of the Free State University and beyond the boundaries of the Free State Province and the country, it became clear that the offence was not limited to the four victims as it was also an offence against humanity. To the extent that denials or minimizations of what really happened during this incident, including the motivations that characterized the setting up of what seems to be an elaborate process to humiliate fellow human beings, would impede the process of recovery on the part of the direct victims; the staging of this video sets back interracial relations in particular, but human relations in general as well.

In regard to revisionism, once the truth has been made part of the public record, there is almost no possibility that it could be revised. This suggests the security of truth, which can only serve to aid the recovery process. Changing details of the event as it has unfolded tends to have a re-traumatizing effect on victims. It is almost as if there are more assaults not only to the person of the victim, but to their ability to represent what has happened, and their integrity. A truth revealed publicly during inquiries or as part of truth commissions has the effect of restoring the dignity and identity of victims. It also affirms the sense of self of the victim as what has been experienced is corroborated, confirmed as real and not illusory (TRC Report, Vol. 1, p. 7). The Reconciliation Ceremony which was hosted jointly between the Commission, the University of the Free State and the Mangaung Local Council in February 2011 represented an intervention which prevented the revisionism of truth as discussed above, setting the stage for a discourse which would take the ongoing process of inter-group reconciliation a step further.

The Perpetrator: individual and systemic

The magnanimity referred to in the TRC reports does not only describe the process of the TRC hearings and what happened then. South Africa as a country opted for a foundation which would allow some form of redemption both for the victim and the perpetrator, for the oppressed and the oppressor. The risk associated with pursuing the perpetrator in a Nuremberg style was untenable in South Africa as both the oppressor and the oppressed lived in the same country. This was a point which Archbishop Desmond Tutu made in the introduction of the TRC reports. He expressed the realness of this risk in the following statement:

There is no doubt that members of the security establishment would have scuppered the negotiated settlement had they thought they were going to run the gauntlet of trials for their involvement in past violations ... Had the miracle of the negotiated settlement not occurred, we would have been overwhelmed by the bloodbath that virtually everyone predicted as the inevitable ending for South Africa. (p. 5).

The accuracy of this assessment and prediction is not the issue for the purposes of this chapter. However, it draws attention to the obligation that those who have been involved in committing violations against others should volunteer the truth, the whole truth, to qualify for the promised redemption. This is an obligation that is raised almost as a prerequisite for reconciliation to take place. Estherhuyse (in Villa-Vicentio and Verwoerd, 2000, p. 144) emphasises this point in asserting that *'reconciliation requires a commitment, especially from those who benefited and continue to benefit from past discrimination, to the transformation of unjust inequalities and dehumanizing poverty.'*

Therefore, in respect of this matter, it was important that some level of volunteered preparedness to acknowledge what happened, and the indignity and injustice that all of this engendered be evinced. A denial of what happened can only serve to exacerbate the shame and trauma caused by this injustice and indignity.

Coming forward in this way (as the four students did on the night of the Reconciliation Ceremony), to tell the truth would not only offer redemption to the perpetrators. Reactions to the Free State University video tended to divide society along racial lines, with the one group condemning the dehumanizing treatment of the four workers while the other group defended the contents of the video by saying that this was just some youthful playfulness, which had been blown out of proportion. In a way similar to the

effects of listening to the TRC hearings and hearing the stories regarding the atrocities that were committed against the oppressed majority, as well as the extent of suffering they endured Estherhuysen (in Villa-Vicentio and Verwoerd, 2000, p. 152) recounts the following:

After having acquainted himself with some of the stories told before the TRC, a conservative Afrikaner phoned and, in a voice conveying his anguish uttered one sentence only: "Ek skaam my to my boude"[I am deeply ashamed].

Similarly, the testimonies of perpetrators of human rights violations carry with them potential to disabuse the section of the public, which seemed to support them, of their misperceptions. The literature on trauma often quotes the fact that the worst effects of a traumatic event are brought about by the responses one receives following the occurrence of the event. It follows then, that the initial denial of the students of what happened, as well as the part of our society that rallied around them in support, and thereby played down or attempted to minimize what had happened, would only have impacted negatively on the victims' abilities to recover.

It is also important to note that individual actions, which violate human rights subtend on socio-structural imperatives, which allow for these actions to take place. As individuals come forward to tell the truth about what happened, incidents such as the one that took place at the University of the Free State, the institutions where they come from are equally implicated, be they families, communities and the institutions of higher learning. Racism has been found to be rampant in institutions of higher learning, even though there are policies in place to deal with discrimination (see Soudien et al.'s report on racism and sexism in institutions of higher learning, 2008). A racist violation of human rights is not coincidental. As Estherhuysen (in Villa-Vicentio and Verwoerd, 2000) suggests, they (violations of human rights) should be treated as part of a more comprehensive story line – the one concerning an ideology and its power and privilege relations; the story of systemic injustice and structurally generated human rights atrocities. These personal and individual histories of suffering and evil-doing, he adds, are usually intrinsically related to systemic conditions (p. 146). In terms of this argument, the systemic conditions that permit for the violations of human rights are as culpable as the individuals acting within and inhabiting them.

The intervention

The failure to recognize the humanity of others and therewith, the others' entitlement to being treated with dignity is part of the legacy of apartheid. When such incidents as the one that occurred at the UFS present themselves, they bring into bold relief the fact that in spite of our commendable achievements as a country, there is still a lot of work to do, and substantive reconciliation depends on this legacy being addressed.

In representing the five workers in the UFS incident, the Commission sought above all, to restore the dignity, which the violation had taken away. The intention was ensuring that they were treated with as much respect and compassion as possible, as part of the process that would present them back to society, through the reconciliation ceremony and other activities, as dignified human beings. As indicated above, the matter was settled out of court, and the workers chose to maintain confidentiality around the value of the settlement they received as part of the resolution of this matter. There were other activities, which were conducted as part of the larger intervention, such as the reconciliation ritual performed by the Deputy Chairperson of the Commission, and the Anti-racism workshop, taking place at the UFS.

In addition, the human rights centre (proposed during discussions between the Commission and the University of the Free State) at the Reitz student university residence offers victims, perpetrators and the University an opportunity to transform the site of violation into an active site of virtue. From the point of view of the Commission, this recommendation facilitates a restoration of dignity to the victims, a redemptive effect on the perpetrators, and an opportunity for a dynamic long-term change in the workings of the university.

There are no guarantees that this intervention will necessarily succeed. However, it remains the best in terms of how the discussion has conceptualized the needed change. In the words of Estherhuysen, talking about transformation relates to talking about change, but not any particular kind of change (p.

148). We concur with his view that notions of justice within a context of transformation and transition are never available in ready-made securely packaged form (p. 151). This is the reason why the intervention where the victims, perpetrators and the university converge with the relevant national stakeholders, under the leadership of the Commission to mount an attempt, is admittedly ambitious, in dealing with the UFS incident. This convergence allows for the inclusion of relevant experts and national leaders in the field, giving input and monitoring, with the possibility of review depending on the progress made. The envisaged intervention, therefore, recognizes the importance of perpetrators and victims, the university and national role players in a collaborative attempt to bring about a resolution with a difference, to the UFS incident.

Equality Courts

As discussed above, the Commission intended taking the University of the Free State and the four students who were implicated in the incident above, to the Equality Court for resolution. Although this did not happen, the important role which Equality Courts could play in providing relief for victims of unfair discrimination, harassment and hate speech should not be overlooked. Equality Courts represent a mechanism which should ensure that all victims of human rights abuses, particularly the disadvantaged and poor, who would otherwise not be able to access the justice system in the more traditional ways, do get access to justice. The ensuing discussion is somewhat different from the above sections of this chapter, in that it narrates what emerged from a project, which sought to monitor the functioning of Equality Courts around the country. This project sampled five courts per province so as to develop a basis from which comments on the functioning or non-functioning of Equality Courts could be mounted. Clearly, the number of courts, which were visited, makes for both the strengths and the limitations of comments that could be made about Equality Courts. Part of the weakness resides in the fact that a sample can only portray part of a bigger picture, but not the whole picture. The strength is engendered in the smaller number of courts, which were visited, allowing for a more manageable number of sampling units, and providing a possibility for depth.

The broad areas which the Equality Court Monitoring tool covers are the ease with which the presence of equality courts could be identified, the presence of promotional material, the presence of Equality Court clerks and presiding officers who have been trained accordingly, other resources for the functioning of Equality Courts, accessibility of the courts for people with disabilities, and the types and number of complaints which have been seen at a given court. The more extended version of the tool, which was not used, covers more details regarding complaints, such as the number of opposed applications granted in default of appearance, number of complaints dismissed due to the non-appearance of applicant/s, number of inquiries completed, number of judgments given, taken on review, taken on appeal, rescinded, executed, etc. As can be appreciated from this, the application of the whole tool during the monitoring of a given court would require a lot more resources. However, a lot of the courts, which were monitored, had handled cases ranging from none to below ten. So the points, which are presented here, still provide an adequate picture of the functioning of Equality Courts. For the purpose of monitoring and observation, the researcher evaluated the presiding officer who has been trained accordingly, the court manager and the Equality Court clerk.

Based on the different provinces and the specific courts visited, points below reflect on the state of the functioning of Equality Courts in the country, and point to some of the challenges and possible solutions.

As a point of departure, there were quite a number of courts, which were perceptibly struggling to accommodate the different functions they had to carry out. The challenges ranged from there being no space which has been set up specifically for the sitting of the Equality Court, to there being no electronic resources and stationery for the Equality Court. For instance, the Tzaneen magistrate court provided an illustration of such space constrictions that the court manager and the court clerks share the front office, where members of the public have to be interviewed as well, depending on the service they are looking for. There appeared to be hardly any space to store files in this office. Similarly, the staff at Seshego magistrate court suggested that if they were running the Equality Court as well, they would have to deal with a logistical nightmare, because they could hardly manage with the current number of courts that were running at their current building, even as the Equality Court was not running.

As part of the resources, which the courts needed to facilitate the adequate functioning of Equality Courts, most of them reported that they did not have promotional material, although there were few

exceptions to these. The reasons for the absence of promotional material ranged from the regional and national offices being unresponsive, to there being an apparent lack of effort on the part of the court staff to request the relevant material from the relevant offices. The result is that members of the public are not adequately informed about the functioning of the Equality Courts, and the Equality Courts fail to attract users from the public. The lack of adequate publicity of the Equality Court was raised as the main reason why they did not function accordingly. Various role players within the court system suggested that national government should re-launch these courts, and a more concerted effort was required to raise the awareness of members of the public on how to use Equality Courts. There was a lot of emphasis put on ensuring that promotional material should be in the language that would be accessible for the specific communities, which the courts served, instead of producing this exclusively in English.

In regard to court personnel for the Equality Court, it has become common knowledge that Equality Court clerks tend to provide services to other courts, even though their official designation is that of Equality Court clerks. The general impression conveyed was that there was very little time given to ensuring that the Equality Court functions as it should, given the amount of work the Equality Court Clerks are required to perform for other courts. Further, at those courts where there was a dedicated presiding officer and an Equality Court clerk, the functioning of the Equality Court seemed to be quite enhanced.

Another point regarding the relevant court personnel and officials refers to the amount of time which has lapsed between the last time they received training, and the time they would have to handle Equality Court matters. There was a general feeling that a refresher course was needed, particularly by those who received training when Equality Courts were first designated. At some of the courts, Equality Court clerks had received training, but they reported that they had not been appointed formally as yet, and that their primary designation was any other than being Equality Court clerks.

Most of the courts, which were monitored, indicated that racial discrimination was the main course for people to bring matters to the Equality Court. Even those courts, which indicated that they had not handled any Equality Court matter, reported that racial discrimination was a concern in their midst, and that most of the incidents that they heard about anecdotally took place at the workplace. Firstly, this suggests that most social interaction seems to still be restricted to the workplace, with very little interracial interaction between the different groups. Secondly, it highlights the vulnerability of workers in relation to employers, and therewith the fact that taking matters to the Equality Court under these circumstances would place workers at the risk of losing their jobs.

The National Action Plan to combat racism, racial discrimination, xenophobia and related intolerance

Work in attempts to eradicate the scourge of racism confirms the observation that racism does not go away by itself. During the occasion of the Durban Review Conference, the General Secretary of the United Nations, Mr. Ban Ki-Moon echoed this sentiment in saying:

Discrimination does not go away by itself. It must be challenged. Otherwise it can become a cause of social unrest and violence. We must be especially vigilant during this time of economic trouble. (Address to Durban Review Conference: 20 April 2009).

There is a suggestion in this statement that potentially, poor economic conditions could exacerbate the effects of discrimination, and it could also increase levels of vulnerability, experienced by the poor and disadvantaged. Therefore, the kind of effort required from states is explicated in the Durban Programme of Action (DPA), which was adopted by the World Conference Against Racism in 2001, in South Africa. In terms of this document, policy development and legislation were emphasised. More specifically, under a section dealing with recommended legislative, judicial, regulatory, administrative and other measures to prevent and protect against racism, racial discrimination, xenophobia and related intolerance, this programme of action stated as follows:

[The Conference] Urges States to establish and implement without delay national policies and action plans to combat racism, racial discrimination, xenophobia and related intolerance, including their gender-based manifestations (Paragraph 66).

The DPA, which is part of the larger Durban Declaration and Programme of Action document (DDPA), is indeed not the only document at the international level, which urges states to develop and implement policies and plans of action to combat racial discrimination. Amongst others, the Committee on the Elimination of Racial Discrimination (CERD) recommends that States should include in their periodic reports information on action plans or other measures they have taken to implement the DDPA (General Recommendation XXVIII of 2009). Other documents are the Report of the Intergovernmental Working Group on the effective Implementation of the DDPA on its fifth session (A/HRC/6/10); Report of the Intergovernmental Working Group on the effective Implementation of the DDPA on its seventh session (A/HRC/13/60); and the Outcome document of the Durban Review Conference in 2009. With this picture drawn, it is clear that at least in the international arena, a national action plan (NAP) is seen as an important instrument in combating racism and related intolerance. The importance of this context relates to the need to highlight the unsatisfactory progress South Africa has made in regard to developing the NAP. This is particularly unfathomable given the leading role that South Africa has played in matters relating to resolving racial tensions and promoting reconciliation. This section seeks to chart the efforts of South Africa to develop the NAP, which are best characterized by the phrase 'continuous stop and go'. It is important to acknowledge that unlike other countries which were quick to develop and implement national action plans, South Africa drew up what is referred to as the Millennium Statement and Program of Action (National Conference on Racism – Final Report 2001), which amongst others, recommended as follows:

.... Conference recommends that the South African Human Rights Commission should develop and adopt a comprehensive national action plan and strategy to combat racism. Such a plan should include amongst other things, indicators of success, time frames and responsibilities, and effective monitoring and evaluation systems.

This recommendation does not comment on the fact that there was a National Action Plan for the Promotion and Protection of Human Rights (1998) in existence already, which the recommendation of the Conference had to articulate itself against. The intricacies of how the two documents were supposed to interact are not the subject of the current chapter. Suffice to state at this point, that the very existence of these documents should have made the process of developing a national action plan for this country much easier than has been the case in other countries, where the groundwork had not been done.

There are indications that a number of attempts had been made to develop a NAP including the existence of a draft but it is uncertain how far it went in the relevant approval processes. However, in 2009, there was yet another attempt, which sought to build on other previous attempts. This initiative, spearheaded by the National Forum Against Racism (NFAR) was provided with support and resources from the secretariat of the NFAR (secretariat based at the Department of Justice and Constitutional Development). There was indeed a concerted effort in this regard, and resources were availed for the Steering Committee of the NFAR to produce the draft NAP. Amongst those who formed part of the Steering Committee, representatives from government departments, civil society and Chapter 9 institutions were included. However, since then, and after a draft was sent for editing, it seems that the process fell off the radar of the government priority list. This seemed to have been revived again at the beginning of 2011, but it lost momentum when the focus for the WCAR 10th Anniversary (held in New York in 2011) shifted from showcasing the development of the NAP for South Africa, to other imperatives.

The point to be made for purposes of this Equality Report, is that the reason why the WCAR urged States to develop and implement policies and action plans to combat racism and related intolerance, is because the NAP is seen as an important instrument to combat racism. The continued absence of an adopted NAP in South Africa is not just a matter relating to lack of posterity. In fact, it represents a weakness in the efforts of this country to fight racism and related intolerance, and it deprives victims of racism of a useful instrument, which forms part of international best practices in fighting racism.

Conclusion

The City Press edition of the 12th February 2012 devoted no less than four pages to race-related experiences in the Western Cape. Amongst others, this shows that racism is as topical today as it ever was. As the balancing of articles suggests in that city press edition, there is an element of classism complicating the picture, which nonetheless does not lose race as the dominant factor in inter-group experiences. This is particularly so when it comes to the more problematic racial experiences as related in the articles referred to above. What is of particular relevance for the report as conceptualized in the introduction, is the fact that such experiences tend to be dismissed as insignificant, do at times escalate to extreme violations of human rights, and may even lead to fatalities as seen in the case of the Skierlik shooting. Although individuals are responsible for actions, which they decide to carry out, environments, which facilitate the emission of such actions, should not escape scrutiny in attempts to fight racism and related intolerance. Such instruments and mechanisms as the Equality Court and policy documents such as the NAP can only aid in the general fight against these scourges. The challenges which continue to affect the functioning and implementation of these, represent a significant impediment against efforts to combat racism and ensure that victims of discrimination in general find access to justice, as provided for in the Constitution.

Reference List

4Died: *A Research Report based on an ethnographized visit to Skierlik: In the aftermath of the racially motivated shooting of black people by a white teenager*: www.sahrc.org.za

Durban Declaration and Programme of Action 2001

Esterhuyse, W. (2000). Truth as a trigger for transformation: from apartheid to transformational justice. In C. Villa-Vicencio & Verwoerd, W. (Eds). *Looking back, reaching forward – Reflections on the Truth and Reconciliation Commission of South Africa*. Cape Town: University of Cape Town Press

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

Ki Moon, B. April 2009. Opening speech at the Durban Review Conference. UN Headquarters. Geneva

National Conference on Racism – Combating Racism: A Nation in Dialogue. Final Report, March 2001

Pierre de Vos, Blog: Constitutionally Speaking

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Ramphela, M. (2008). *Laying ghosts to rest – Dilemmas of the transformation in South Africa*. Cape Town: Tafelberg

The Constitution of the Republic of South Africa, 1996

Truth and Reconciliation Report, Vol. 1. (1998) Cape Town: Truth and Reconciliation Commission

**GENDER EQUITY IN THE WORKPLACE:
Assessing Performance of Private and Public Sector Entities in South Africa**

Thabo Rapoo, Director of Research

*Vernet Napo, Deputy Director for Research
Commission for Gender Equality (CGE)*

Abstract

This chapter reports on and discusses the findings of the assessment carried out by the Commission for Gender Equality (CGE) on the implementation of and compliance with the provisions of the Employment Equity Act¹ (EEA) by employers in the public and private sectors to promote gender equality in the workplace in South Africa. The assessment was carried out in 2010 and 2011, with private and public sector employers who were required to respond to an open-ended questionnaire as well as to appear at Public Hearings convened by the CGE to provide relevant information on their compliance with key provisions of the EEA. Existing evidence based on previous work carried out by the CGE and other organisations continues to show that despite the existence of various relevant laws to promote gender equality in the workplace, progress continues to be unsatisfactory.

The chapter will argue that despite the general appearance of compliance and a façade of relevant internal policies, programmes, processes and practices to promote gender equity in the workplace, practical outcomes largely reveal a reality of continued neglect of gender equity as a constitutional, policy and legislative obligation. The report calls for greater and more visible leadership from the Commission for Gender Equality, the strengthening and support from within the National Gender Machinery including the Department of Labour and Employment Equity Commission in particular, to monitor compliance with the provisions of the EEA, with greater emphasis on sanctions for non-compliance.

Introduction

Gender equality is one of the basic rights guaranteed under South Africa's Constitution. It is an integral part of the country's system of fundamental basic human rights intended to guarantee the right to equality for all South Africans.² The enjoyment of this constitutional right is enforced through a plethora of legislation and codes of good practice intended to eliminate unfair discrimination on the basis of a number of grounds such as religion, race, age, disability, culture, language and birth. The Constitution therefore mandates a number of state institutions to promote and protect these basic human rights. The CGE is mandated to protect and promote respect for gender equality in the public and private sectors in South Africa.

This chapter reports on and discusses the findings of the Public Hearings conducted by the CGE to assess compliance by private and public sector employers with the provisions of the EEA. The Public Hearings sought to determine the effectiveness of the efforts of employers in the private and public sectors to promote gender equity in the workplace through internal processes, policies, practices, procedures and mechanisms specifically designed for this purpose. The exercise also sought to assess the challenges facing public and private sector institutions in terms of promoting and ensuring gender equity in the workplace. The Public Hearings took place on 7th - 9th December 2010 and 17th - 18th February 2011, conducted in fulfilment of the CGE's constitutional and legal mandate to monitor, investigate, conduct research, educate, advise and report on matters relating to the promotion and protection of gender equality in the public and private sectors in South Africa.³

This chapter adopts the view that poor compliance and poor enforcement of relevant internal policies, programmes and processes to promote gender equality in the workplace have resulted in the failure to achieve significant progress. The chapter makes relevant recommendations, among others, for

¹RSA, Employment Equity Act (no. 55), 1998.

²See The Constitution of the Republic of South Africa (Act 108) of 1996, s 9(3).

³Refer to the Commission for Gender Equality Act (no. 39) of 1996 and The Constitution of the Republic of South Africa (Act no. 108) of 1996, s187.

improved and effective capacity as well as better leadership from the CGE on gender transformation in society in general and in the workplace in particular, as well as the strengthening of the capacity of the National Gender Machinery to monitor compliance with the EEA. The chapter also calls for stronger emphasis on sanctions for non-compliance.

Methodology and Approach

The CGE used the Employment Equity Act and its implementation as a tool to assess progress in promoting gender equity in the workplace (by both public and private sector employers) in South Africa. The CGE stated the purpose of the Public Hearings were as follows:

- To assess the impact of the Employment Equity Act on women in both the public and private sectors, and address institutional and systemic barriers to their economic progress;
- To hold public and private sector directors accountable for non-compliance with the Act;
- To raise awareness on the relevant international commitments and the importance of compliance;
- To assess what measures have been put in place to bring about transformation in terms of gender and disability;
- To share experiences and identify challenges faced by CEOs and Director-Generals in the implementation of the Act and;
- To strengthen the working relationship between constitutional bodies and civil society in raising awareness about South Africa's compliance with international instruments, support and capacity interventions in this regard.

A two-track methodology was adopted. Firstly, an open-ended questionnaire was drafted to probe a set of key issues and themes relating to employment equity in the workplace. The guide was sent to a selected number of private companies and public sector institutions, seeking relevant information on these identified key issues. Amongst these aspects were questions relating to data on the following:

1. Percentage representation of women in senior management positions.
2. Measures to promote gender transformation and to increase women's representation.
3. Assignment of responsibility for gender transformation and inclusion in performance management.
4. Inclusion of gender and disability in recruitment policy, and resources allocated for transformation.
5. Systems implementation to monitor progression of women and people with disabilities.
6. Implementation of capacity-building programmes to accelerate gender transformation.
7. Implementation of succession plans, mentoring and promotion of policies to support women's progression.
8. Support mechanisms implemented to enable women to balance professional and domestic responsibilities.
9. Implementation of gender awareness measures in the workplace.
10. Implementation of sexual harassment and other relevant policies in the workplace.
11. Challenges experienced in realising gender transformation in the workplace.

This method provided the respondents with an opportunity to respond to the questions as well as to prepare supporting documents to be sent to the CGE for examination and analysis to determine compliance with the provisions of the EEA. The information gathered through the open-ended questionnaire also enabled the CGE to prepare for the second phase of this exercise – the Public Hearings.

The second phase of this exercise entailed the issuing of invitations to private and public sector employers to appear before the CGE and to make presentations in respect of their company's employment equity performance information and to provide supporting documentation. In instances where selected respondents refused to cooperate or declined the invitation, subpoenas were issued. The Public Hearings provided a vital platform not only for the CGE to pose probing questions to the respondents and getting them to account for their performance on gender equity and gender transformation, but also for the respondents to clarify issues raised by the Commissioners and outline their plans for the future. A total of twenty-one (21) respondents comprising eight (8) private companies

listed on the Johannesburg Stock Exchange and thirteen (13) national departments (which included the Presidency and the National Treasury) were invited to appear before the CGE.

The following eight (8) private companies were invited, as indicated below. The Information in parenthesis indicates whether or not the respondent attended and responded to the questionnaire:

- Aveng Group (attended and provided written response).
- BidVest Bank (attended and provided written response).
- Poynting Antennas (attended and provided written response).
- Esorfranki limited (attended and provided written response).
- Kairos Industrial holdings ltd. (did not attend but provided written response).
- Great Basin Gold (attended and provided written response).
- Alliance Mining Group (did not attend and did not provide written response).
- Joy Mining machinery (attended and provided written response).

As indicated above, only seven (7) of the invited private sector employers participated in the Public Hearings. The public service respondents invited to appear before the CGE included the following:

- Department of Correctional Services (attended and provided written response).
- Department of Environmental Affairs (attended and provided written response).
- Department of Tourism (attended but did not provide written response).
- The Presidency (attended but did not provide written response).
- Department of Health (did not attend but provided written response).
- Department of Public Enterprises (attended and provided written response).
- The National Treasury (attended and provided written response).
- Department of Education (did not attend but provided written response).
- Department of Trade and Industry (attended and provided written response).
- Department of Arts and Culture (attended and provided written response).
- The office of the Auditor-General (attended but did not provide written response).
- Department of Public Service and Administration (attended and provided written response).
- Department of Labour (attended but did not provide written response).

The data provided through the open-ended questionnaire, supporting documents as well as through the presentations at the Public Hearings were analysed for content and examined in terms of the respondents' performance and compliance with the provisions of the EEA. The CGE compiled a report that contains the findings and recommendations arising out of this exercise.⁴ This chapter draws on the contents of this main report and provides some of the key findings and recommendations contained in it.

Employment and Gender Equity: Overview of the Legal and institutional Framework

The area of employment remains one of the key challenges, both for the private and public sectors in South Africa, in terms of the application, implementation and enforcement of relevant laws to promote and protect gender equality. More specifically, gender equality in the workplace remains an elusive goal for many employers in South Africa. This is despite a clear constitutional provision outlawing gender discrimination as indicated below, and legislative and policy instruments (both national and international) as well as different codes of good practice aimed at promoting gender equality in the workplace.

Section 9 (3)⁵ of the South African Constitution is part of the comprehensive Bill of Rights guaranteeing basic socio, economic, cultural and political rights to all South Africans. Among others, it prohibits any form of discrimination based on a range of stipulated as well as implied grounds. One of these stipulated grounds is gender. Furthermore, section 9 (4) of the Constitution makes provision for the enactment of relevant national legislation to implement the prohibition of discrimination. One of the key pieces of

⁴See Commission for Gender Equality, 'Gender Transformation in the Workplace: Report on Employment Equity Public Hearings' (forthcoming, in 2012).

⁵Section 9(3), "the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth".

national legislation intended to prohibit discrimination and promote equality and fair treatment in the workplace is the Employment Equity Act (EEA). The Act makes provision for a number of crucial aspects in the implementation and enforcement of gender equality in the workplace. Firstly, it provides for the promotion of *“equal opportunity and fair treatment in employment through the elimination of unfair discrimination”* as well as the implementation of *“affirmative action measures to redress the disadvantages in employment experienced by designated groups, to ensure their representation in all occupational categories and levels in the workplace.”*⁶ Designated groups include *“black people, women and people with disabilities”*.⁷ Therefore, the EEA is a crucial tool within an assortment of other instruments at the disposal of bodies such as the CGE seeking to promote and protect respect for gender equality in the workplace. It not only prohibits unfair discriminatory employment practices against designated groups by employers, but also mandates the introduction of positive affirmative action measures to promote equity in the workplace.

Secondly, the Act makes provision for the establishment of a Commission for Employment Equity, which, among others, advises the minister on codes of good practice and benchmarking the setting of sectoral numerical employment targets. Thirdly, the Act provides for the registration of designated employers, monitoring, enforcement and the assessment of compliance. Fourthly, the Act mandates the introduction of a range of other key aspects such as the creation of, and reporting on, Employment Equity Plans by designated employers, assignment of responsibility for Employment Equity Plans to relevant managers and performance agreements incorporating relevant numerical performance targets on the promotion of equity in the workplace.

While the Act is an important legal instrument for the promotion of equity and fair treatment of designated groups, particularly women as the focus of this chapter, its potency is enhanced when applied in conjunction with other relevant local and international legal and policy instruments. Among the local legal and policy instruments are: the Labour Relations Act (LRA) 66 of 1995, the Basic Conditions of Employment Act (BCEA) 75 of 1997, the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) 4 of 2000, the White Paper on Affirmative Action (1998) as well as a range of relevant Codes⁸ such as the Code of Conduct on Employment Equity, the Code of good practice on Sexual Harassment, the Code of Good Practice on the Preparation, Implementation and Monitoring of Employment Equity Plans and other codes similarly intended to underpin the implementation of the EEA.

In addition to the Bill of Rights enshrined in the country's constitution, the various national legal instruments and codes of good practice, there are also relevant international instruments to which the country is a signatory. For example, the International Labour Organisation (ILO) Conventions 100⁹ and 111¹⁰ are aimed at prohibiting any form of discrimination, including gender discrimination, in the workplace. ILO Convention 100 on Equal Remuneration prohibits discrimination and promotes equal treatment on the basis of the principle of *‘equal remuneration for men and women workers for work of equal value’*. Furthermore, ILO Convention 111 on Discrimination (Employment and Occupation) mandates each signatory/member country *“to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.”*¹¹ It is clear therefore that the EEA's application is underpinned by a set of potentially effective national and international legal and policy instruments intended to prohibit gender discrimination and promote equal and fair treatment in all aspects of the workplace in South Africa.

In addition to current legal and policy instruments, a set of formal institutions exist in South Africa, designed to institutionalise support for and to monitor and evaluate the promotion of gender equality through proper application of relevant laws and policies in various sectors, including the workplace. This

⁶Employment Equity Act, s2(a & b).

⁷Employment Equity Act, Chapter 1.

⁸Issued in terms of s54 of the Employment Equity Act.

⁹ILO Convention 100 Equal Remuneration, 1981.

¹⁰ILO Convention 111 on Discrimination (Employment and Occupation), 1958.

¹¹ILO Convention 111, Article 2.

set of formal institutions is collectively known as the National Gender Machinery (NGM).¹² These structures exist at national and provincial levels, both inside and outside government and the state. They include the Ministry of Women, Children and People with Disabilities; departmental gender units (e.g. Gender Focal Points) at national, provincial and local levels; relevant parliamentary and legislative portfolio committees and women's caucuses. There are also independent state and constitutional bodies intended to promote gender equality and secure the rights of women in various sectors of society. These include the CGE; Public Service Commission; South African Human Rights Commission and the South African Law Commission. Besides these formal government and state-based institutions, there are also numerous gender-based civil society organisations (i.e. NGOs, Civic Organisations and Think-Tanks) that are part of a broader collection of independent gender-based structures which also serve the broader goal of advancing gender equality as well as supporting the efforts of government and state-based gender machinery in South Africa. Collectively, these bodies constitute an institutional and systemic network of support structures underpinning efforts to attain gender equality and fair treatment in all sectors of society.

Gender Equity in the Workplace: Brief Overview of Current State of Affairs

As indicated in the foregoing discussion, it is clear that a well-defined set of legal, policy and other instruments exist to institutionalise and strengthen the course of gender equality and gender transformation in various sectors of South African society, including transformation in the workplace. Despite the promulgation of the Employment Equity Act (1998)¹³ as the key legal instrument promoting gender equality in the work place thirteen years ago, and the existence of other equally important legislative instruments aimed at promoting equality and fair treatment in other areas of economic, political, social and cultural rights, women continue to face intense discrimination and unfair treatment in many areas of life, particularly in the workplace. In fact, there is significant evidence suggesting that gender discrimination and unfair treatment of women in general, and in the workplace in particular, continues unabated. This implies clear, deep-seated and systemic barriers towards the advancement of the interests of women not only in the application of existing laws, policies and codes of good practice, but also in terms of the efficacy of the NGM in promoting gender equality and ensuring monitoring of the process of gender transformation.

Research work conducted by the CGE suggests that there is still much to be done in the public and private sectors to advance the course of gender transformation in the workplace.¹⁴ The Employment Equity Public Hearings, the findings of which are reported in this chapter, also revealed the scale of the problem in terms of the poor performance of public and private sector institutions in promoting gender equity.¹⁵ In addition, research work carried out by the EEC¹⁶ and the Public Service Commission (PSC),¹⁷ as well as data provided by the Business Women's Association (BWA)¹⁸ and the Labour Force Survey 2010 show that *"gender transformation in the workplace is not receiving the recognition and response required."*¹⁹

It is clear therefore that the key challenge in advancing gender equality and fair treatment is not the lack of relevant laws. It would appear that the challenge is the lack of effective implementation of existing laws and the lack of effective monitoring and application of appropriate sanctions in cases of poor

¹²See RSA, South Africa's National Policy Framework for Women's Empowerment and Gender Equality, 2000 (Prepared for the Office on the Status of Women, the Presidency), & Nadia Sanger, 'Engendering the National Gender Machinery', *New Agenda* (South African Journal of Social and Economic Policy), Issue 29, no. 1, 2008.

¹³RSA, Employment Equity Act.

¹⁴See CGE, *The State of Women Empowerment and Gender Equality*, (CGE Gender Barometer Project Report), 2007.

¹⁵See Commission for Gender Equality, 'Gender Transformation in the Workplace: Report on Employment Equity Public Hearings' (forthcoming in 2012).

¹⁶Employment Equity Commission Annual Report, 2010.

¹⁷PSC, *Gender Mainstreaming in the Public Service*, (Report of the Public Service Commission), 2006

¹⁸Business Women's Association *Business Women in Leadership Census*, 2010.

¹⁹Commission for Gender Equality, 'Gender Transformation in the Workplace: Report on Employment Equity Public Hearings' (final draft), 2011, p. 8.

compliance or the complete lack thereof. It is imperative therefore that the obstacles preventing the promotion of gender equality in the workplace are understood and dealt with.

CGE Employment Equity Hearings: The Findings

This section presents the findings of the assessment work carried out by the CGE, through its Public Hearings held in December 2010 and February 2011, of the implementation of, and compliance with, the Employment Equity Act by employers in the public and private sectors. The section provides only broad and general findings related to the private and public sector entities. Due to limited space, the findings of this exercise are presented in a highly summarised format, addressing only the key selected issues raised in some of the questions in the open-ended questionnaire as indicated under section 2 above. Specifically, only the findings relating to themes 1 to 5, 10 and 11 are discussed. The main report of the CGE Public Hearings will be made available on the organisation's website soon for more comprehensive information on the findings of this exercise.

Employment Equity in the Workplace: Performance of the Private Sector Institutions

As indicated above, eight (8) companies were requested to complete a questionnaire in addition to being invited to appear before the CGE but only seven (7) obliged.

Firstly, two key broad observations were made during the Public Hearings. One of these was the apparent lack of awareness, among the private companies that were invited to participate, of the constitutional mandate and powers of the CGE to demand respondents to account as part of its mandate to monitor and evaluate the programmes and activities of private and public sector institutions in promoting gender equity. This was demonstrated by the reluctance of some of the companies to appear before the CGE at the Public Hearings. As a result of this reluctance, four (4) of the private companies were issued with subpoenas.²⁰ It is clear therefore that more work needs to be done to communicate to the public about the mandate of the CGE. The second observation relates to the poor performance of the private sector in promoting gender equity in the workplace. It was found that, generally, the private sector appears far from achieving the gender equality targets as provided for in legislation. This in itself is not surprising, as it merely confirms the findings of work done previously by the CGE and other institutions showing that the course of gender equality in the workplace in South Africa is still facing intractable obstacles going forward.

On the first issue of women's representation at senior management level in the corporate sector, the CGE found that on average, women constituted approximately 12% of senior and top management echelons in the private sector. This low level representation was particularly the case in the mining and technical industries, which are traditionally male-dominated. In addition, analysis of the information provided by many of the private companies that appeared before the CGE seems to show that current gender transformation processes are likely to benefit white women more than black women. It would appear that many companies are making insufficient efforts and putting in place inadequate measures to ensure the recruitment and promotion of black women to positions of senior management.

On the question of measures put in place to promote gender transformation in the workplace, all the companies that participated in the CGE Public Hearings reported having in place employment equity plans, and having formulated appropriate policies and programmes, with regular submissions of reports showing their performance against these plans. Some of the companies cited instruments/mechanisms such as bursaries, talent scouting processes, leadership training, mentoring and coaching programmes and remuneration as measures to ensure gender equity and transformation in the workplace. However, in many instances the companies could not provide evidence to support the claims made in their responses during the public hearings. It was also found that virtually all the companies that were invited to participate in the Public Hearings had failed to develop and implement appropriate and formal gender equity intervention programmes and strategies. Clearly, many companies have adopted approaches that amount to malicious compliance, focussing on the bare minimum to ensure a semblance of compliance with the EEA while the substance of the compliance is substandard. The EEA requires employers to go beyond mere plans, and to design specific formal interventions such as affirmative action programmes

²⁰ For the power to issue subpoenas, the CGE invoked the provisions of Section 18 of the Commission for Gender Equality Act

and other appropriate measures underpinned by specific policies, processes and programmes relating to recruitment, training, promotion, remuneration and other relevant aspects of employment. It was found that many employers were lacking in this regard.

It was also found that the gender and disability components of employment equity tended to be ignored, in contravention of the EEA. There was a general lack of coherence in terms of gender transformation policies and policies addressing disability. In addition, there was scant evidence of specific numerical targets, strategies, targeted skills development programmes, designated responsibility for gender transformation and evaluation of performance in gender transformation through performance management mechanisms.

With regard to the question of assigning responsibilities to specific managers for gender equity and transformation, the EEA requires that employers designate managers with responsibility to drive gender equity and transformation programmes. Specifically, there are requirements that such responsibilities are incorporated into individual performance agreements to enable regular performance assessment with regard to promoting gender equity. The picture here was mixed, with some employers citing internal processes such as regular senior management meetings to communicate the importance of gender equity and transformation to relevant managers. In some cases companies claimed to have incorporated responsibilities for gender transformation in the performance contracts of senior management, while in other cases it was claimed that, Chief Executive Officers (CEOs) were responsible for facilitating the process of gender transformation. In the majority of cases, little evidence was furnished to support these claims.

The open-ended questionnaire, together with the Public Hearings, required respondents to provide information indicating whether or not gender and disability criteria were incorporated into recruitment policies and procedures, as well as the resources allocated towards promoting gender equality in the work place. The majority of the eight companies that appeared before the CGE reported, having incorporated the necessary criteria in their policies and processes of recruiting and advancing women in the workplace, and allocating the necessary resources towards this objective. Those that indicated otherwise cited financial problems or lack of suitable female candidates for the positions concerned as reasons for their failure to comply with the EEA. In a number of cases, the participants indicated that transformation committees were in place, with the necessary resources, to drive the process of gender transformation in the workplace. However in the majority of cases, the CGE could not verify these claims as objective, supporting evidence was never provided. Alternatively, in cases where supporting documents were provided, these were inadequate to enable informed assessment by the CGE. The variety of approaches in the way companies have attempted to comply with this aspect of the EEA is evidence of the need for greater consistency in monitoring and guidance, particularly by the Employment Equity Commission and the Department of Labour. It is also evident that employers are ignoring existing codes of good practice relating to key aspects of the EEA.

On the question of systems implemented to monitor the progression of female employees and people with disabilities in the workplace, the responses were just as varied. Employers cited systems varying from payroll, audit committees and business information management systems to Human Resource information management systems, simple excel spreadsheets, monthly business reviews and BEE Scorecards as systems in place to track the progression of women and people with disabilities towards senior positions in the work place. Once again, evidence to substantiate these claims was inadequate.

On the problem of sexual harassment and discrimination of female employees in the workplace, employers were asked to furnish information showing that appropriate internal policies were in place and being implemented. There was a great deal of consensus in the responses. The majority of companies that appeared before the CGE indicated that they had a Sexual Harassment Policy of one kind or another, in addition to a range of other instruments such as grievance procedures, disciplinary procedures and various codes of good conduct or practice. One respondent even referred to the case of two senior managers found guilty of sexual harassment, although no information was provided of the sanctions applied against the two senior managers. Despite the majority of the companies testifying to the existence of these various anti-Sexual Harassment instruments, many of them indicated that no cases of sexual harassment had been reported and dealt with through such instruments. One interpretation of this is that the deterrent impact of these instruments is so effective that incidents of sexual harassment are rare. However, an alternative interpretation is that such policies and instruments,

where they exist, are either so ineffective in their application or so unknown and unfamiliar to employees that they are hardly invoked or trusted, leading to cases of sexual harassment in the workplace going undetected and unreported. The CGE is inclined to subscribe to this second interpretation. Evidence of this was provided by the CGE during the Public Hearings when it was found that four cases of sexual harassment at one of the companies appearing before the CGE had been reported to the CGE, even though the senior representative of the company had made a presentation indicating that no incidents of sexual harassment had ever occurred or been reported in the company. This could suggest that companies are failing to publicise the existence of these policies and failing to ensure that policies on sexual harassment are applied effectively to prevent victims of sexual harassment being intimidated into silence.

On the question of the challenges experienced by companies in complying with the EEA, many of them cited a range of constraints such as lack of adequate capacity and knowledge as well as the shortage of suitably qualified candidates, thus making it difficult to recruit women and people with disabilities. In particular, companies in the mining, engineering and technical/mechanical industries cited lack of interest or the necessary qualifications among women as the reason why they were failing to make greater progress in gender equity in the workplace. Interestingly though, female-dominated sectors such as the catering and hospitality sectors are equally, if not more so, performing poorly with regard to female representation in senior levels, compounded by high levels of casualisation of labour, including incidents of sexual harassment. Some of the companies also referred to the fierce competition on the job market among employers for the few skilled, trained and educated professional women.

Employment Equity in the Workplace: Performance of the Public Institutions

A total of thirteen national government departments, including the Presidency, were invited to appear before the CGE to account for their performance and progress in promoting gender equity in the workplace. Surprisingly though, the CGE encountered some resistance and lack of cooperation from some of the departments, which resulted in the CGE having to resort to the use of subpoenas against two (2) of the thirteen (13) departments. Again, as was discussed above in the case of the private sector, this reflects a worrying lack of understanding among national government departments of the role and status of the CGE as a constitutional body, and a worrying disrespect for one of the key institutions of the National Gender Machinery.

The CGE is also concerned that government departments were barely performing better than the private sector in addressing transformation with regard to gender and disability, despite clear constitutional and legislative provisions in this regard. The state target for female representation at senior management levels is 50%, with the target for the employment of persons with disabilities set at 2%. Yet many government departments are not achieving these targets. In addition, the Department of Public Service and Administration reported that departments are generally failing to report adequately on employment equity, and concerns were raised at the lack of accountability for poor performance on gender equity in the workplace, and lack of sanctions for such non-compliance.

Of great concern is that some of the departments have failed to address gender equality and disability altogether. In some instances, relevant posts have not been filled; budgets not set aside; responsibility not assigned to senior management or included in performance management processes and; no career-pathing defined for women and people with disabilities. Some departments have failed to implement EEA requirements to develop affirmative action programmes to enable equal employment opportunities for women and people with disabilities. Of equal concern is the apparent failure of many departments to understand and adopt government's Heads of Department's Eight Principles Action Plan for Promoting Women's Empowerment and Gender Equality within the Public Service, including the requirement for a 50/50 representation in decision-making. Most departments were reluctant to commit themselves to achieving this target by 2015 in line with the SADC Gender and Development Protocol to which South Africa is a signatory. Related to this is that departments revealed surprising ignorance of international conventions relating to gender equality and disability, which South Africa is also obliged to abide by and implement.

On the issue of female representation at senior levels of government in the public service, it would appear that based on information provided by government departments, gender equity in the workplace is advancing slightly better than their private sector counterparts, with an average representation of

women at senior management levels reaching about 44%. However, this average is obscuring variations in performance by different government departments, with some of them performing rather badly. Some departments achieved as low as 30% in gender equity, although one department achieved as high as 49%. Furthermore, the appointment and location of Gender Focal Persons (GFPs) continues to be a source of discontent in many departments that are failing to comply with policy requirements for such appointments to be made at the level of Director.

On measures implemented by government departments to promote gender transformation and increase women's representation, many departments are using the EEA as a guide, adopting its target guidelines. However, many others have adopted a variety of measures ranging from affirmative action, senior executive development programmes and numerical targets for internships, mentorships and succession planning. In some instances, the departments reported using a combination of many of these methods. It would appear that no common approaches existed regarding best practices to promote gender transformation. Moreover the effectiveness of these various approaches is hard to determine.

The assignment of responsibility for gender transformation and inclusion of gender criteria in the performance management of appropriate managers remains a problem for many of the departments. It was found that in many instances the responsibilities relating to gender equality and disability were being conflated, further undermining the effectiveness and impact of these portfolios. With very few exceptions, the departments reported that responsibilities for driving gender transformation were assigned to senior management but only one department mentioned that such responsibility was assigned to a Gender Focal Person. In many cases departments made reference to senior managers as being responsible, without specifying the type of senior managers responsible. This means that departments are either not appointing Gender Focal Persons to handle this responsibility, or such persons are not part of the senior management levels in these departments.

The CGE also demanded that public service employers indicate how gender and disability criteria are incorporated into employer recruitment policies and the resources allocated towards achieving these goals. Only a few departments indicated that their recruitment policies did not prioritise gender transformation, preferring to focus on all categories of employees during recruitment and selection. The majority of departments however reported that their recruitment and selection policies placed great emphasis on women, while others mentioned the 50/50 numerical target incorporated into their recruitment and selection practices, even though many of them could not provide supporting documents to substantiate these claims. This made it impossible for the CGE to determine the veracity of many of these claims. In many cases therefore the CGE relied on word of mouth and unsubstantiated responses to the questionnaire by respondents.

Introducing and implementing a sexual harassment policy is one of the statutory requirements that employers were asked by the CGE to report and account. The Public Hearings once again found that virtually all the departments claimed to have such policies in place. Only one of the departments admitted to having no sexual harassment policy in place. Yet the Public Hearings revealed that sexual harassment in the workplace continues, largely unabated. The overall thrust of departmental responses on this issue left a strong impression that the issue of sexual harassment was not being given the serious attention it needs to be stamped out as a workplace criminal offence. Many departments reported that no cases had been reported. However, just as in the case of private companies, the CGE believes that the apparent absence of reported cases of sexual harassment by employers is not an indication that sexual harassment in the workplace is not taking place, but rather that policies are either poorly communicated to potential victims of sexual crimes, or that the victims lack the confidence in the effective application of these policies in the workplace. It is also possible that many of the victims face intimidation and peer pressure not to report such cases. Some departments provided information but not objective supporting evidence on how employees were being sensitised on matters of sexual harassment and measures in place to prevent and punish culprits. One department indicated that workshops were conducted to sensitise employers while another department pointed out that the policy is accessible to employees on the company website.

Finally, participants were asked to identify the challenges or constraints that undermined their ability to implement gender transformation in the workplace. The most commonly cited issue was the lack of

appropriate skills among women, particularly in the technical, engineering and scientific sectors. This is puzzling given that many departments cited their skills development programmes, bursaries and other financial support mechanisms to provide female employees with the necessary skills. Several departments also reported that retention of senior level female managers with the necessary skills was proving extremely difficult because of huge demand for them, and poaching by other organisations including the private sector. One department pointed out that applicants for posts advertised by the department failed to indicate their disabilities, thus making it impossible for the department to identify and appoint them.

Conclusion

The CGE is encouraged by the various interventions undertaken by some employers in the public and private sectors to support gender equity in the workplace, particularly the introduction of measures such as executive training for women, leadership development, mentorship, bursaries for further education, the development of employment equity targets and their integration into strategic plans. There are also encouraging signs of the willingness of employers to monitor the interventions that they have put in place, including the allocation of responsibility for gender transformation to senior managers, and the incorporation of relevant performance indicators for such responsibilities in their performance agreements.

Some of the employers have also demonstrated willingness and signs of progress in putting in place the necessary structures, policies and strategies to underpin gender transformation in the workplace. However, significant concern still exists regarding the implementation and impact of these efforts, particularly given the continuing trend of women's under-representation in senior management. Furthermore some employers do appear to be making earnest attempts to address issues such as the training of women in preparation for senior management positions, interventions targeting single parents and measures to assist women to advance their professional development in the workplace.

From the discussion above, a number of conclusions can be drawn regarding the promotion of gender equity in the workplace.

Firstly, it is clear that both the private sector and public sector employers are struggling to comply with the provisions of the EEA, in particular the requirement to achieve specific numerical targets for female representation in the senior echelons of organisational management. This is despite the existence of a range of (local, national and international) policy instruments, legislation and codes of practice mandating the promotion of gender equality in the workplace. This is also despite the existence of various institutional mechanisms, collectively called the National Gender Machinery, mandated to oversee, coordinate and monitor the promotion of gender equality in South Africa. This also suggests the need for improved and effective capacity and leadership from the Commission for Gender Equality, and the need to strengthen its capacity to drive and prioritise the national agenda around gender transformation in general, and gender equality in the workplace in particular.

Secondly, the implementation of the key provisions of the EEA remains inconsistent, and compliance is largely patchy both within the private and public sectors. This reflects a poor understanding or lack of familiarity with key provisions of the EEA, but also severe weaknesses in current systems for monitoring and holding employers accountable for non-compliance.

Thirdly, employment equity in the workplace continues largely to receive lip service and limited systemic attention despite organisational policies, programmes and interventions intended to address the plight of women and people with disabilities in the workplace.

Fourthly, many organisations are unable to provide accurate and reliable information relating to their performance on employment equity. This reflects ineffective Employment Equity Planning and reporting systems and/or poor reporting enforcement mechanisms.

Fifthly, employers in the public service are generally failing to comply with the requirement to appoint Gender Focal Persons (GFP) at Director Level to enable the gender equity agenda to be driven from senior management levels of the organisation. This has contributed towards an environment where

gender equality has become just one of the multiple priorities competing for scarce resources and attention from employers.

Finally, despite the majority of employers (both private and public service) testifying to having clearly defined anti-sexual harassment policies, it is clear that their ability and willingness to stamp out sexual harassment in the workplace is undermined by the poor communication of these policies with all categories of employees, as well as weak enforcement processes within the workplace, leading to lack of confidence among victims of sexual harassment.

Recommendations for Policy Action

Flowing from some of the conclusions outlined above, a number of recommendations for policy action are identified below.

- Improve and strengthen the capacity of the National Gender Machinery to monitor the implementation of the EEA by the public and private sector organisations. In particular, strengthen cooperation and collaborative strategies involving the Commission for Gender Equality, with support from the Ministry of Women, Children and People with Disabilities, the Ministry of Labour, the Employment Equity Commission and labour unions, to monitor and oversee public and private sector efforts towards gender transformation in the workplace.
- Strengthen the institutional capacity of the Commission for Gender Equality, sharpening its legal authority to make binding interventions, and placing greater emphasis on its visibility as an institution driving the national agenda for gender transformation.
- It is proposed that the Commission for Gender Equality, in collaboration with the Department of Labour and the South African Human Rights Commission, urgently convenes a national consultative conference of stakeholders, involving public and private sector employers, the Ministry of Women, Children and People with Disabilities, labour unions, employer associations and civil society organisations to discuss the challenges facing the implementation of the EEA and other relevant policies and laws, and to forge effective consensus on the best joint strategies and implementation programmes to prioritise and promote gender transformation in the workplace.
- The Department of Labour and the Employment Equity Commission should review and, if necessary, revise current Employment Equity reporting systems for employers, placing greater emphasis on standardising requirements for accurate information, with rewards and incentives for compliance and severe penalties for non-compliance.
- The Department of Labour, the EEC and the Commission for Gender Equality should ensure the strengthening of current mechanisms, processes and procedures for reporting sexual harassment in the workplace, placing greater emphasis on easier access to the justice system and protection of victims of sexual harassment against intimidation by employers and/or perpetrators. In particular, it is imperative to place greater emphasis on information dissemination about the rights of victims of sexual harassment and alternative, accessible and non-employer driven sexual harassment reporting processes to encourage greater numbers of victims of sexual harassment lacking confidence in employer-driven reporting processes to come forward and report their experiences.

DISABILITY AND EQUITY IN SOUTH AFRICA

Leslie Swartz:

Clinical Psychologist and a Professor in Psychology at Stellenbosch University

Introduction

South Africa has progressive legislation regarding the inclusion of disabled people in the workplace, in education, and in mainstream healthcare services. A number of disabled people are members of parliament and hold high office, up to deputy minister level. Disability issues are recognized by a number of civil society organizations as key to the realisation of rights in South Africa's democracy.

Despite these reasons to celebrate, there are many causes for concern. The first one is that there is a gap between good policy and its practical implementation. Some of this is attributable to inheritance from apartheid planning – for example, apartheid urban design increase travel distances which creates particular transport challenges for disabled people. Secondly, there are issues of persistent stigmatizing social attitudes, including abuse of disabled people across the lifespan. One particular challenge, which needs attention, is that of resources. Thirdly, many poor families survive through disability grants or care dependency grants; the increase in these grants places a burden on the fiscus and also leads to allegations of abuse of grants by disabled and nondisabled people alike.

Lastly, there is a long way to go in terms of achieving equity for disabled people in South Africa. International instruments like the United Nations Convention on the Rights of Persons with Disabilities may be helpful to take the agenda forward, but this will not be enough. Challenges against the movement forward include the fact that increased participation and visibility of disabled people may represent participation by a relatively small group. A further challenge is the conflation between appropriate talk and rhetoric about disability rights on the one hand, and concrete steps to improve lives on a wide scale, on the other.

The Constitution of the Republic of South Africa places the issue of disability rights at the heart of South Africa's democracy. Section 9 of the Bill of Rights states amongst its clauses:

3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, conscience, belief, culture, language and birth.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

This is an extremely powerful positioning of disability issues alongside other key issues affecting the functioning of a democracy, including for example, issues of race and gender. Not only does the state have obligations in terms of disability, so too does every citizen living in the South African democracy.

At the same time that the Constitution was being developed, the Integrated National Disability Strategy (INDS), a white paper foundational to how disability rights would be seen and promoted in South Africa, was being developed. In the foreword to this 1997 document, the then Deputy President of the Republic of South Africa, Mr. Thabo Mbeki wrote:

Among the yardsticks by which to measure a society's respect for human rights, to evaluate the level of its maturity and its generosity of spirit, is by looking at the status that it accords to those members of society who are most vulnerable, disabled people, the senior citizens and its children.

The concept of a caring society is strengthened and deepened when we recognise that disabled people enjoy the same rights as we do and that we have a responsibility towards the promotion of their quality of life.

We must stop seeing disabled people as objects of pity but as capable individuals who are contributing immensely to the development of society.

We must play an active role in working with them to find joy and happiness and the fulfillment of their aspirations. (INDS, 1997).

This commitment from the government to the realisation of disability rights is important. The realisation of disability rights, furthermore, rests on two platforms, both of which are fundamentally important. These are the right of disabled people to participate equally with others in society, and the need for society to protect people who are vulnerable. An emphasis on either one of these poles without consideration of the other may create problems for the realisation of rights.

Historically, the way that disability is viewed has tended to focus on one of these poles, and it is important to understanding disability rights to recognize this. In what has come to be known as the "medical model" of disability, a model, which dominated understandings of disability for a long time, the emphasis was on the vulnerability of disabled people. Disability was likened to a disease, which needed to be cured, and, crucially, the people who had expertise to talk about the needs of disabled people were medical doctors and other health professionals, who were given the role by society of caring for the sick and disabled people. Much good work was done and continues to be done within a medical model framework, especially with reference to access to appropriate health care, for example.

But the process of medicalization of disability also had negative consequences. In the 1960s and 1970s, alongside other civil rights movements, disabled people began to protest against the way that they were cast as 'abnormal' and to point out that alongside the element of protection of vulnerable people that were overtly part of the medical model. They argued that the medical model was prescriptive about what bodies were acceptable to the broader society and played a role in marginalizing and silencing disabled people, and in keeping them hidden from society. In 1975, the Union of the Physically Impaired Against Segregation (UPIAS) declared:

We ... reject the whole idea of "experts" and professionals holding forth on how we should accept our disabilities, or giving learned lectures about the "psychology" of disablement. We already know what it feels like to be poor, isolated, segregated, done good to, stared at, and talked down to - far better than any able-bodied expert. We as a Union are not interested in descriptions of how awful it is to be disabled. What we are interested in are ways of changing our conditions of life, and thus overcoming the disabilities which are imposed on top of our physical impairments by the way this society is organised to exclude us. In our view, it is only the actual impairment which we must accept; the additional and totally unnecessary problems caused by the way we are treated are essentially to be overcome and not accepted. We look forward to the day when the army of "experts" on our social and psychological problems can find more productive work. (UPIAS, 1975).

In what from the early 1980s came to be known as the "social model" of disability, disabled activists themselves took the view that what disabled people face are not only the bodily impairments but the way in which they are treated and discriminated against in society. Within the realm of physical impairment, for example, it is commonly pointed out that a well-qualified wheelchair user who is unable to work as a clerk in a business which is housed in a building upstairs but where there is no lift, is disabled (excluded from work and full participation) not by the impairment of not being able to walk but by the physical barrier of lack of a lift in the building. The person could work easily were there a lift, and so it is the physical environment, which is causing a barrier. Behind this barrier, crucially, is an attitudinal barrier, which leads people to build inaccessible buildings and to choose to house their business in such buildings.

The social model was crucial to the drafting of the INDS, and a previous South African Human Rights Commission report on disability, aptly entitled Towards a Barrier-Free Society (SAHRC, 2002) clearly defines disability in a social model way:

Disability is imposed by society when a person with an impairment is denied access to full economic and social participation. Society fails, physically or culturally, to accommodate the rights and needs of individuals with impairments. (SAHRC, 2002: 9, italics in the original)

It is not by chance that one of the leading architects of what came to be known as the social model of disability, and one of those to argue forcefully that disability was primarily an issue of political exclusion and oppression of disabled people rather than a question of bodily impairment, was the late Vic Finkelstein. Finkelstein had been active in the anti-apartheid movement and had been detained under apartheid laws, before seeking refuge in Britain in the late 1960s. The language of liberation in South Africa can be seen to have its parallels (partly through Finkelstein's influence) in how disability activism was framed in Britain and further afield. Given this history, it is not surprising how the movement for disability rights fed and was fed by the struggle for liberation and human rights in South Africa.

There are other models of disability, which are used currently, but for the purposes of this chapter, the medical model/social model distinction is the important one. The 2011 World Report on Disability points out, though, that the medical model and the social model should not be seen as “dichotomous” (p. 4) because disabled people may indeed have particular health needs arising from their condition. As will be seen in this chapter, a major challenge for delivery of services for disabled people in South Africa, and for realisation of their rights, lies with competing definitions and views of disability and in difficulties with locating issues of disability clearly in one place. Disability is a pervasive issue, which affects everything else in society, and for this reason addressing it becomes a complex task, requiring rethinking and interventions at a range of levels.

Promoting disability rights in a democratic South Africa

The Constitution of the Republic of South Africa and the Integrated National Disability Strategy demonstrated clearly that disability rights are integral to human rights in general in South Africa. They also made it clear that there are certain responsibilities, which need to be exercised if the ideals in those documents are to be realized. The establishment of the Office on the Status of Disabled Persons (OSDP) within the highest office in the land – the Presidency – was a major achievement. This office stood alongside other key offices in the presidency – the Office on the Status of Women (OSW) and the Office on the Rights of the Child (ORC). In 2009, in what many hailed as a further step forward, a Ministry for Women, Children and Persons with Disabilities²¹ was established, with a corresponding Portfolio Committee on Women, Children and Persons with Disabilities in Parliament. Critics of the establishment of one ministry covering women, children and disabled people's needs altogether (and this comes not only from activists in the disability sector) argue that the motivation for putting these groups together in one ministry is the issue of perceived vulnerability of all groups, a strategy which may tip the scales in favour of paternalistic practices which emphasise protection rather than the attainment of equal rights, especially for women and disabled people.

Some disabled people enjoy high status and high visibility in South Africa. There are, for example, a number of disabled Members of Parliament and the most prominent among these is the current (at the time of writing) Deputy Minister of Women, Children and Persons with Disabilities, the Hon. Hendrietta

²¹There are many debates about appropriate terminology for disability and disabled people. In keeping with social model conventions, South Africans have tended to use the term “disabled people” because according to the social model, people are disabled by society. Hence the term “Office on the Status of Disabled Persons”. Other legislation such as the Employment Equity Act uses the term “persons with disabilities”. By the time the Ministry was established, the term used was “persons with disabilities” (Ministry for Women, Children and Persons with Disabilities), in contrast to OSDP usage. This reflects the usage in the United Nations Convention on the Rights of Persons with Disabilities – to be discussed later in this chapter – as well as the influence of North American terminology on disability, which argues a people-first approach. The argument is that people are more than their disabilities, and that the term “disabled people” totalises their experiences and reduces them to nothing more than products of disablement. There is no consensus on use of the terms “disabled people” or “people with disabilities”; both usages reflect concern with the rights of disabled people. In South Africa, in activist circles the term “disabled people” continues to be used extensively despite the official terminology in the Ministry moving to “persons with disabilities”.

Bogopane-Zulu, who was formerly the Deputy Minister of Public Works. It is significant that the Deputy Minister has a long history within the disability movement in South Africa, and also, crucially for South Africa, served as the disability representative on the South African National Aids Council (SANAC). The 2012-2016 National Strategic Plan (NSP) on HIV, STIs and TB states:

People with disabilities have higher rates of HIV. Attention should be paid to the different types of disability, as the vulnerabilities of different groups and the associated interventions required will vary. (NSP, 2012:4).

The fact that the NSP makes this statement, and the fact that disability is mentioned at various other places in the report as an issue requiring special attention (for example, there are some disabled people who have particular communication needs in order to access HIV services) is not just a product of improved knowledge about disability and HIV. It is also a product of activism on the part of disabled people and those who support disability rights to assist those in other fields (HIV being one example) to consider the integral disability aspect to their fields. The contribution of prominent disabled activists to the way that disability is seen and acted upon cannot be underestimated, and though it is impossible to know how the previous and current National Strategic Plans in the HIV field would have looked without the participation of people like the Hon. H Bogopane-Zulu, their influence is clear to see.

In terms of legislation, the issue of disability has received similar prominence within the dismantling of apartheid legislation and the promulgation of new laws. There is a slew of legislation both current and forthcoming, which mentions disability, and a full review of this legislation will not be given here. Some key areas, which deserve particular attention, however, are those to do with education and with employment. These areas are especially important because the participation of disabled people on an equal footing in South Africa depends centrally on their having the same skills sets as other South Africans, and the same opportunities to exercise these skills sets and to be remunerated for them.

As far as education is concerned, the South African Schools Act of 1996 required government to “take all reasonable measures to ensure that the physical facilities at public schools are accessible to disabled persons.” The Education White Paper 6 of 2001 went further than this, arguing that ideally all public schools should be equipped to accommodate disabled learners. It was further planned that there would be 500 ‘full-service’ educational institutions, which could cater to the needs of all learners. The White Paper acknowledged that there were some special facilities needed (for learners with especially severe or complex impairments), but the overall policy, in line with the social model of disability, is towards inclusive education. This means accommodating learners within the mainstream together with their able-bodied peers. These inclusive imperatives apply equally to skills education and to the higher education sector in South Africa.

As far as employment issues are concerned, the key piece of legislation was the Employment Equity Act of 1998, to which there have been amendments. The Act includes disabled people with black people as what are termed “designated groups” and requires the setting of employment equity targets and affirmative action to redress the balance of previous exclusion. According to the summary made by the Department of Labour of the Act, affirmative action must include:

- identification and elimination of barriers with an adverse impact on designated groups;
- measures which promote diversity;
- making reasonable accommodation for people from designated groups;
- retention, development and training of designated groups (including skills development); and
- preferential treatment and numerical goals to ensure equitable representation.

Issues of employment equity are treated in terms of legislation in a similar way to issues of diversity and equity affecting other groups – once again the issue of disability rights is seen as inseparable from issues of human rights more generally.

The Disability Framework for Local Government 2009-2014 is one official document, which demonstrates the commitment by the government towards disability rights. It is an important document

in that it attempts to build on the overarching INDS framework to make the realisation of disability rights a reality at local level. The Framework notes that though some progress has been reached in realising the rights of disabled people, there remains a long way to go. It cites the results of a study of local authorities in 2005, which was conducted by the Social Cluster Committee of Parliament, and highlighted the following issues:

- A disability framework/legislation was needed.
 - There was policy evaporation, in that policies were not reaching disabled people.
 - Disability had to be prioritized in all the programmes.
 - Senior management should be committed to addressing disability.
 - Accountability of senior managers tended to be lacking.
 - Workshops were needed to educate officials on disability rights.
 - All schools should promote inclusive education.
 - A multi-purpose skills centre for people with disabilities had to be established.
 - Learnerships had to be instituted.
- (Disability Framework for Local Government 2009 – 2014, p. 14)

Documents such as this reflect both the gains that have been made in achieving equity and the fact that there are challenges associated with these attempts, and these challenges will be discussed in the following section.

Challenges in achieving equity for disabled people

It has become a commonplace in South Africa for it to be claimed that there is a gap between policy and practice, that there are good policies but a problem of implementation. This is no less the case with disability issues. In almost every sphere of life, it is possible to point to instances where the delivery of opportunities has not matched the promises made. It is not possible in a chapter-length document to do justice to the range of ways in which delivery has not been achieved; only some core issues will be touched upon here.

1. Ignorance and lack of skill

If South Africa is to move to becoming a barrier-free society, many people will have to contribute to this goal. These people range from policy-makers to politicians, to local government officials and ordinary South Africans going about their business in a diverse society. It is clear from the Disability Framework for Local Government document that many people at the local level are simply ignorant about disability issues and disability rights. It is a sad truth that many South Africans are raised to have patronizing or hostile attitudes towards disabled people (see later discussion), but it is probably even more true to say that many South Africans have not had the opportunity to engage with disability issues at all. As the World Report on Disability shows, disability is far more common than once thought (and is likely to increase with ageing populations world-wide). There can be few people who have not experienced disability in their family and social networks. Despite these facts, the history of disability world-wide is a history of silence, concealment and exclusion. Disabled people have been removed from mainstream society, and there is a dearth of coverage of disability issues in public fora and in the media.

Given these realities, many South Africans do not think of disability issues as core to the realisation of human rights. Basic knowledge about communicating with people with sensory impairments, of how the physical environment can be adapted to accommodate people with mobility impairments, for example, is not widespread.

Clearly part of the solution to this is widespread disability awareness training, but without more visibility of disabled people and disability issues in society, the plethora of training which has been provided by a variety of disability consultants will achieve limited success. It is important that every mainstream human rights issue is explicitly interrogated for its disability component. This is not only because disability intersects with every other social divide that there is (including divides of race, gender, wealth, education, literacy and urban-rural divides) but because the task of mainstreaming disability issues is

ongoing. Ignorance, fear and anxiety, and lack of skill are major issues, which affect how able-bodied people at all levels of society interact with disabled people.

2. Stigma and discrimination

Some critics would say, and they would be correct, that the invisibility of disabled people and of disability issues is in itself a form of stigmatization and this is true. It is not by accident that many people are ignorant about disability and that many fear it as something unknown and different from the general fabric of life. Proponents of the social model would correctly point out that health professionals have played an important social function in hiding disabled people from the rest of society by keeping them in institutions, for example.

While it is possible, however, to understand a great deal of the ignorance about disability as a product of broader social processes of exclusion and discrimination, it remains important to distinguish between ignorance at an individual level from individual acts of stigmatization and discrimination. For example, there is a difference between a public official who has simply never thought of adapting form-filling procedures to accommodate needs of people with substantial visual impairment and another official who believes that people with visual impairment should be kept in institutions and should not be out in society and should not hold up queues in public places because they cannot fill in forms unassisted.

Unfortunately, stigma and discrimination exist. Mgwili and Watermeyer (2006) movingly describe the difficulties faced by women with physical disability in accessing reproductive health care. Tellingly, the health workers' poor treatment of these women reflected a combination of ignorance and discriminatory attitudes. For example, when they intrusively would ask women "how are you going to give birth?" or "how are you going to hold your baby?" these questions reflect both health-care workers' lack of knowledge about how disabled women can and do have children and care for them, and how these workers feel about the rights and abilities disabled women have to be mothers. Mgwili and Watermeyer argue that these forms of discrimination are based partly on an anxiety about the health workers' own frailty and their inability to cope with difficult life and death issues. Tellingly, the authors argue:

The lack of training of most health care professionals in emancipatory, socially critical models of disability is centrally relevant here. In addition, it is a truism that, in times when one is confronted with an anxiety-provoking unknown, such as that experienced by staff dealing with a disabled service user, there is reassurance in establishing any sense of 'knowing' who and what one is dealing with. Put another way, it may be easier to 'decide' what the experience, capabilities and difficulties of the disabled women are 'in advance', rather than remaining in the anxious, uncertain position of seeing and feeling something anxiety-provoking, but not knowing 'what it means'. Thus, stereotypes may be understood, at times, as procuring a sense of control in the observer - control in the face of the tentativeness and threat of what Goffman termed "sticky interactions" between "normals" and "the stigmatised". (Mgwili & Watermeyer, 2006: 268).

As these authors convincingly show, the issue of stigma and discrimination is centrally that of "sticky interactions". These "sticky interactions" between people who regard themselves as "normal" and those they regard as "abnormal" go far beyond issues of health care and disability, and link with a range of other "sticky interactions" in society as a whole. To take the issue of race, for example, some white people who have long had exclusive access to certain beaches, may claim that there are certain accepted or "normal" standards of behaviour and dress on these beaches and would say that their objections to having black people on these beaches has nothing to do with race but rather with accepted or "normal" standards of behaviour. It would not come as a surprise that some of these people would similarly object to the presence of disabled people on the beaches because their appearance or behaviour (including, for example, athetoid movements, drooling, or unusual speech) might upset "normal" people or "normal" standards of behaviour.

3. The question of resources

South Africa is an extremely unequal society, and though it is clear world-wide that disabled people are over-represented amongst the poorer groups, it is also the case that the legacies of colonial conquest and apartheid have led to enormous backlogs in service provision. Current economic policies and the situation of the world economy only exacerbate matters. One of the difficulties with provision for disability access is that reasonable accommodation for the access needs for disabled people may incur

costs. Some of these costs are once off and reasonable to calculate, such as the retro-fitting of inaccessible buildings by construction of ramps and lift access. In budgets, which are constrained, the argument is commonly made that investment, for example, in access for disabled people, who form a minority, cannot be warranted. The fact is that provision for access for disabled people when properly done and within the framework of what is termed universal design, often has positive spin-offs for other people. Having good ramps in public buildings, for example, provides benefits for people who are narrowly defined as disabled, but is also of help to many elderly people who have trouble with walking, people recovering from injuries, and parents pushing children in prams or strollers. Conversely, not providing access for disabled people can have impacts on people who are not disabled, and can become costly. For example, a certain South African institution did not provide lift access to the higher floors in its three-storey building. The institution generated large amounts of paper, which is heavy and had to be carted up and down the stairs. This work was done by a janitor who was employed, by the organization as a fit, able-bodied, young man. Carrying heavy loads of paper up and down the stairs repeatedly, eventually contributed to the janitor's developing serious back problems. The janitor eventually had to be medically boarded from his job on the grounds of disability. Thus, by not creating an environment accessible to disabled people, the institution was complicit in the cause of disability of an employee, and the process of medical boarding was expensive for the company.

Not all accommodations, which have to be made to create access are once-off which can be easily costed. In the case of some disabilities, the accommodations are often much less predictable. Consider, for example, the situation of an employee who has a psychosocial disability such as schizophrenia. The person may be a good worker, but may have periods of active psychosis during her working life. These periods of psychosis are not easy to predict, and may occur at times which are very inconvenient to an employer. Here the costs of accessibility are difficult to budget for and to control in any way, which, in a situation of high unemployment, may lead employers to wish to employ people who do not have psychosocial disabilities. This is understandable from an employer's point of view, though there is some good evidence from international research that disabled people make good and reliable employees, possibly because they are aware of the prejudiced view in respect of their disability.

4. The question of social security and grants

One of the most vexing issues to face the fiscus in a democratic South Africa has been that of social grants, and disability grants in particular. The system of providing grants for disabled people was inherited from a time when there was differential spending on the basis of race, and the grant system was designed primarily with the white population in mind under apartheid. It is a major achievement of the current dispensation that there has been a rapid increase in grant uptake, especially amongst groups who did not have equal access to social security, including black South Africans and people living in remote and rural areas. There are, however, a number of serious challenges (Swartz & Schneider, 2006).

Since there is no widespread poverty relief in South Africa, the fact is that many poor households survive on disability grants and old age pensions. The intention with disability grants is to support people who are unable to work because of their disabilities. In a situation of high unemployment, it is very difficult to separate disability as the sole cause for unemployment. People are unemployed primarily because of a scarcity of employment opportunities along with inadequate marketable skills. However, the situation for disabled people is worse than that of able bodied people as far as rates of unemployment are concerned and in general disabled people form part of a far larger group of unemployed people.

The question of deciding who is and who is not disabled is also very difficult. There is no clear dividing line between people classified as disabled and those classified as able-bodied. Most impairments are not visible, and for obvious reasons it is hard (and may be costly) to detect invisible disabilities. If a person is unable to work because of hypertension or emphysema or as a consequence of having suffered a closed head injury (an injury which is relatively common given the high rate of road traffic accidents in South Africa), detecting that this person is disabled, and differentiating them from someone who falsely claims disability, requires skill and time. Health professionals in an already overtaxed health system may have to take time away from their core work of prevention, treatment and care of illness and promotion of health, to make actuarial decisions about categorizing people into 'disabled' or 'not disabled'. These decisions may be emotionally taxing for these health professionals because of the consequences of the decisions for personal and household livelihoods. It is very difficult to say to a

person facing hunger that they are not disabled enough to be given a grant with which they can buy food.

These issues are exacerbated by the fact that many impairments, are cyclical or sporadic. In a country with a well-developed and extremely expensive social security system like Sweden, for example, it is possible for disabled people to work together with officials on a recursive basis, with repeated assessments of disability being conducted, and disability being understood along a sliding scale. In South Africa, regular repeated assessments are expensive and not possible to conduct, and it is bureaucratically extremely challenging to take people on or off grants, not to mention the implications of this for sustainability of livelihoods.

The fact that different impairments have vastly different cost implications is also a matter of concern, and difficult to deal with under a single grant system. For a person with a high spinal cord injury, for example, there will be extensive costs associated with daily care; without care (which costs money), many such people will die. Contrast this situation with that of a manual labourer who has lost an arm but is otherwise physically fit. This person may well be unable to continue working but will have no, or minimal care needs or costs. Yet both people are covered by the same grant provisions.

There are discussions currently underway concerning the development of a chronic illness grant, but as things stand, disablement from all causes is classified under the same heading. The issue of HIV is one that has caused a great deal of controversy. Quite apart from the fact that at one time rather different decisions were being made in different sites regarding at which stage in the condition to provide disability grants, the HIV/disability grant interface is complex. A person may become very ill and unable to work as a result of HIV and would then definitely be eligible for a grant. If this person goes onto antiretroviral medication, however, they may recover functioning and hence will technically no longer be eligible for a disability grant. Taking the person off a grant, though, could affect nutritional status and health, disabling the person once again.

Underlying all these issues, though, is a far more fundamental question. Within South African policy (if not yet in all legislation), there is a commitment to the social model, a commitment which has certain implications. Firstly, grants or handouts are not seen as ideal in a social model approach. Ideally, people should be given the skills and opportunities to earn money and to participate equally with others in society. Though this developmental and human rights approach is appreciated in theory, in practice there are few opportunities for people to gain skills and then to participate in earning a living, so the view of disability as primarily a vulnerability issue is reinforced.

Secondly, the social model recognizes that it is the social barrier and not the impairment alone, which is disabling. This leads to a situation in which two people have the same impairment but only one of them is disabled. Take, for example, two equally skilled people, both of whom are wheelchair users and both of whom would like to work as bank tellers. The first person lives close to accessible public transport and can get easily to work. The second lives on an unpaved bumpy street, and minibus taxi operators in the area refuse to transport wheelchair users, or when they do, the charge is excessive. In the social model, it is easy to see how the second person may be classified as disabled (because of social and resulting physical barriers to participation) whereas the first person may be seen as not disabled, because the environment does not create a barrier to participation (in this case, working in a bank). The second person, who has an impairment and faces participation barriers, may well qualify for a disability grant. Let us now assume that the bank for which the first person works goes bankrupt, and all the employees, able-bodied and disabled alike, lose their jobs and cannot find other work. The basis on which the employed person is now unemployed is in fact not the impairment or participation restrictions on account of disability. In one view of the social model, this person still has an impairment, but though now unemployed, does not in fact have a disability.

A social grants system true to the social model could with some justification continue paying a grant to the person living in an inaccessible area, but refuse to pay a grant to the now unemployed person living in an accessible area. From both a political and humanitarian standpoint, however, this would be very difficult to do. It would be just as difficult to take the grant away from the person living in the inaccessible area if the roads in the area were to be newly tarred and an accessible rapid transit bus route to be developed, with a stop easily reached from the person's home.

In summary, the complex issue of social grants provision encapsulates many key issues for provision of services and livelihoods in South Africa – and these issues go far beyond questions affecting disabled people alone. Once again, the issue of disability highlights many broader concerns.

5. Disability and spatial legacies

It is clear how patterns of discrimination and oppression have influenced the experience of disability in South Africa today, especially given the circular relationship between disability and poverty. An important feature of the apartheid system (and one that is often overlooked in discussions of disability) is that integral, to its racist and economic components, apartheid was a spatial project. Black people were relegated to areas far away from goods, services, and centres of economic activity. The result of this is that many disabled people continue to live far away from potential places of employment and education. A major barrier to full participation by disabled people in South African life is that of a lack of affordable, accessible, and safe public transport. Part of why this transport is needed, however, is that many disabled people continue to live in areas which were designated for black people, far away from the centre of much activity. Transport remains a major challenge, and not only for people with mobility impairments – for example, women with sensory impairments such as blindness and deafness may struggle to find transport in which they are free from sexual harassment and abuse. But, part of why this transport is needed, and needed on such a scale, is that we continue to inhabit spaces designed by apartheid and its precursors.

South Africa as a world player in issues of disability equity

As has been seen, the genesis of the struggle for self-determination by disabled people in the United Kingdom has links with the anti-apartheid movement through the contributions of Vic Finkelstein. South Africa has also been an important player more recently, and made important contributions, for example to the drafting of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). The Africa Decade of Persons with Disabilities, furthermore, which is a continental NGO mandated to promote disability rights throughout the continent, has its headquarters in South Africa. The United Nations Special Rapporteur on Disability, Mr Shuaib Chalklen, is a South African, and he enacts his global responsibilities from his base in South Africa. Specialised university training courses in disability and rehabilitation, are offered by some South African universities and these courses attract candidates from elsewhere, and particularly from other African countries. A number of South Africans consult on disability issues and disability rights world-wide, and this is something to celebrate.

The fact is, however, that these activities, impressive though they are, place added responsibility on South Africa as a society and South Africans as a whole to practice what we preach. The signing and ratification of the UNCRPD places responsibilities on South Africa which now need to be met – it is easy to sign a document but far more difficult to enact everything that the document requires. There are those who argue that South Africa should not have signed the UNCRPD because of the challenges of delivery – and, indeed, wealthier countries with far more developed infrastructure have not signed because they are concerned about challenges they may face with delivery. Though there is merit in this view, there can be little doubt that South Africans do respond to aspirational documents like the Constitution, and this may be another example. The onus on all South African institutions and on all South Africans is to work towards the ideals of such documents, local or international, to celebrate successes, to be frank about failures, but to continue to work to make things better, and to monitor this progress.

References

Mgwili, N, & Watermeyer, B. (2006). Physically disabled women and discrimination in reproductive health care: psychoanalytic reflections. In B. Watermeyer, L. Swartz, T. Lorenzo, M. Schneider, & M. Priestley (Eds.). *Disability and social change. A South African agenda* (pp. 261-272). Cape Town: HSRC Press.

Republic of South Africa (1996). Constitution of the Republic of South Africa

Republic of South Africa (1997). White Paper on An Integrated National Disability Strategy

Republic of South Africa (1998). Employment Equity Act

Republic of South Africa Department of Education (2001). Education White Paper 6. Special needs education: building an inclusive education and training system

Republic of South Africa Department of Provincial and Local Government (2009). Disability framework for local government, 2009-2014.

South African Human Rights Commission (2002) *Towards a barrier-free society*. Johannesburg: SAHRC

South African National AIDS Council (SANAC) (2011) National Strategic Plan on HIV, STIs and TB, 2012-2016

Swartz, L., & Schneider, M. (2006). Tough choices: disability and social security in South Africa. In B. Watermeyer, L. Swartz, T. Lorenzo, M. Schneider, & M. Priestley (Eds.). *Disability and social change. A South African agenda* (pp. 234-244). Cape Town: HSRC Press.

Union of the Physically Impaired Against Segregation (UPIAS) (1972). Downloaded from www.leeds.ac.uk/disability-studies/archiveuk/UPIAS/UPIAS.pdf

United Nations (2009). *Convention on the Rights of Persons with Disabilities*. New York: UN

World Health Organization and World Bank (2011). *World report on disability*. Geneva: WHO.

ADVOCATING FOR EQUALITY IN ACCESSING LIVELIHOOD ASSETS FOR DISABLED YOUTH

Theresa Lorenzo:

Disability Studies Division, Department of Health and Rehabilitation Sciences, Faculty of Health Sciences, University of Cape Town

Abstract

Disability-inclusive development advocates equal opportunities for disabled people in all aspects of economic, political, cultural and social life. This paper attempts to give a picture of the inequalities faced by disabled youth and the factors that enable them to sustain their livelihoods.

A cross-sectional study design was used to survey 989 youth in nine sites across five provinces in South Africa. Snowballing was used to identify youth between ages of 18-35 years of age. The sample comprised 523 (52.9%) disabled and 466 (47.1%) non-disabled youths. Fieldworkers used a questionnaire to interview youth in their homes. Barriers to education for disabled youth were limited financial resources, social exclusion and exclusion by design. The main barriers to employment were poor health, lack of skills and job opportunities and social attitudes. Knowledge of available services by local government and non-governmental organisations was also poor. There is a need for efficient dissemination of information and more active community services and programmes from the health, education and social sectors of local government. Local councillors should also be more aware of inequalities experienced by disabled youth. Resources should be mobilised for inclusive youth development programmes aimed at economic and social empowerment. Curricula across different disciplines at higher education institutions should integrate disability issues so that future graduates are well versed in providing disability-inclusive policies and programmes across all sectors. In this way we will achieve equal citizenship for disabled youth.

Introduction

The millennium development goals have not considered and integrated disability as a cross-cutting theme of development (Albert, 2006). Disability is not only about a health condition, but rather discrimination and systematic exclusion, which should be addressed as a question of fundamental human rights. As with gender, disability inequality needs to be seen as rooted in society and not biology! Yeo (2006) argues that inclusion and exclusion are two sides of the same coin and that some inclusion could exacerbate inequalities. She advocates for building horizontal alliances with other oppressed groups to show that other possibilities exist. Together with gender, race and disability, a young person may be moved away from the nucleus of society, specifically in areas such as the socio-economic and political life. Overcoming poverty could ensure inclusiveness of disabled people into the different government strategies such as skills development, education, housing and human settlement as examples. Dube and Charowa (2005:9) portray poverty as being:

“a symptom of imbedded structural imbalances, which manifest themselves in all domains of human existence. As such, poverty is highly correlated with social exclusion, marginalisation, vulnerability, powerlessness, isolation and other economic, political, social and cultural dimensions of deprivation. It results from limited or no access to basic infrastructure or services, and is further compounded by people’s lack of access to land, credit, technology and institutions and to other productive assets and resources needed to ensure sustainable livelihoods”.

Young people make up the largest and fastest growing proportion of Africa’s general population (Panday, 2006). The African Youth Charter (AU, 2006) outlines several articles in which non-discrimination, development, participation, policy and education and skills development should be addressed to counteract historical influences. Most importantly Article 14 recognises the right of young people to a standard of living adequate to their holistic development. According to Panday (2006), the Youth Charter creates a legally binding framework for governments to develop and fast-track the

implementation of supportive policies and programmes for young people so that they can fulfil their responsibility of contributing to the continent's development. Pandaay (ibid) recognises this charter as an opportunity to renew Africa's social and economic capital if youth have opportunities to realise their potential.

Imperatives within the South African National Youth Development Policy Framework (NYDPF) (2002-2007) target disabled youth as being particularly vulnerable to the historical context of South Africa. They are identified as a priority target group requiring particular support and assistance. The NYDPF recognises strategies such as learnerships, the National Youth Service, small, medium and micro enterprises, as well as strategies such as the Extended Public Works Programme as contributing to livelihood strategies of youth. About 70% of the unemployed in South Africa is youth (NYDPF, 2002). However, there are no specific statistics on livelihood strategies of disabled youth, so it is unclear whether these strategies are accessible to disabled youth to claim rights to open employment and access services.

This paper aims to share the results of a study on the livelihood assets of disabled and non-disabled youth. The chapter will discuss strategies related to rights-based approaches to disability, which can be adopted to inform inclusive policy development and implementation so as to remove the inequalities faced by disabled youth.

Methodology

Our research focused on a comparison between black disabled and non-disabled youth living in vulnerable communities in urban and rural contexts. The Disabled Youth Enabling Sustainable Livelihoods study was initiated in 2007 by the Occupational Therapy and Disability Studies divisions of University of Cape Town, who collaborated with occupational therapy departments at five other universities in South Africa. A mixed methodology approach was employed using a sequential transformative strategy (Creswell, 2003). The strategy has two distinct data collection phases: firstly, a qualitative phase so that in depth, rich data can be gathered. This data was then used to design a questionnaire for a survey using a cross-sectional design. The questionnaire covered the five livelihood asset categories, namely, human assets (education and health), financial assets, social assets, physical assets and natural assets. Ethical approval was obtained from Faculty Research Committees of Universities of Cape Town, Witwatersrand and Pretoria. All respondents signed an informed consent form.

Population and sampling

Youth is defined in the Africa Youth Charter as between the age of 14-35 years old (AU, 2006). The fieldworkers identified disabled youth between ages 18-35 years of age through snowballing. They then matched non-disabled youth who were five years older or younger and who lived on either side or across the road from disabled youth. A sample of 989 individuals [523 (52.9%) disabled, 466 (47.1%) non-disabled youth] were interviewed in 2009. Youth with physical, mental (including intellectual) or sensory impairments were selected.

Data collection and analysis

Fieldworkers carried out individual interviews with respondents that took about 30-45 minutes in their home language. Data collection took place during the day and was limited to the work week, thus excluding most individuals employed formally or full-time. Descriptive analysis was used to characterise the disabled and non-disabled youth. Differences between groups were established using chi-squared and *t*-tests. We performed logistic regression analyses to identify differences in barriers to education and employment among disabled and non-disabled youth. All statistical analyses were conducted using SPSS software (ver. 17.0; SPSS, Inc., Chicago, IL, USA).

Results

The demographic characteristics of the disabled and non-disabled youth are summarised in Table 1. Age, gender, and cohabitation with partners differed between the two groups. A significantly larger proportion of non-disabled youth (NDY) was female (62.0% vs. 46.9%; $p \leq 0.001$) and disabled youth were, on average, significantly older than non-disabled youth (26.1 vs. 25.7; $p \leq 0.05$). When the age

variable was divided into two categories (18–25 years, 26–35 years), the proportion of disabled youth aged 18–25 years (50.1%) was not significantly different to that of non-disabled youth (44.6%). The largest proportion of disabled youth were affected by physical disability (n = 231, 44.2%), followed by

Characteristic	Total N=989	Non-disabled N=466	Disabled N=523	χ^2	<i>t</i>	<i>p</i>
Female	54.0%	62.0%	46.9%	22.5		≤0.001
Age [years; mean (SD)]	26.1 (5.0)	25.7 (4.6)	26.5 (5.3)		2.481	0.013
18–25	47.2%	50.1%	44.6%			
25–35	52.8%	49.9%	55.4%			
Living situation						
Living with parents	50.2%	47.0%	53.0%	3.5		0.065
Living with partner	16.7%	22.5%	11.5%	21.7		≤0.001
Living with family	19.1%	17.4%	20.7%	1.7		0.196
Living alone	3.1%	3.0%	3.3%	0.1		0.857

intellectual disability (n= 169, 32.3%).

When comparing access to the five livelihood assets among disabled and non-disabled youth, Lorenzo and Cramm (2012, in press) showed that disabled youth have a greater struggle to access livelihood assets than their non-disabled peers. Regarding health assets, there was no difference between disabled and non-disabled youth related to most frequently seen health professionals. Doctors are seen more at hospitals and nurses at clinics. In looking at social assets, both groups received the same amount of support from immediate household members, but significantly more NDY received support from extended family, friends, partners, and neighbours. NDY also spent significantly more time engaging in all free-time activities. In terms of facilities related to physical assets, NDY reported greater access to bathrooms, phones, and newspapers as well as public services and business sector. Participation and access were limited similarly for both groups due to inaccessible public transport. Municipal services and local government councillors are not known by disabled youth. The results are able to inform the training of professionals on inequities related to disability and to monitor the transformation agenda aimed at creating an inclusive society (Lorenzo and Cramm, in print, 2012).

Two current papers have explored barriers to education and employment respectively (Cramm et al. 2013 in print; Cramm et al. in print, 2012/2013). In education, we found a large difference among disabled and non-disabled youths (99.3% vs. 82.4%; $p \leq 0.001$). Far fewer DY than NDY attended and completed school. Almost all NDY (n=458, 99.3 %) attended school, compared to 211 DY (50.4%). 91 DY did not attend (17.6 %). Of those who attended, 58.1% NDY (n=266) completed school while only 173 DY (40%) completed school. Access to higher education was minimal for both groups, although slightly better for non-disabled youth. While disabled youth gave financial reasons as barrier to completion (n=254, 59.5 %), no significant relationship between financial exclusion and education was found when logistic regression analysis was done. Social exclusion and exclusion by design (Simanowitz, 2001), which included distance, difficult admissions systems and lack of information for disabled youth, were significantly associated with education for disabled youths. Thus, exclusion by design could be reduced through proper information about schools, less complicated admission systems, improved access, and removal of physical obstacles (Cramm et al., 2013, in press). Reducing negative social attitudes requires interventions aimed at teachers and families of disabled youth. These barriers to education particularly disadvantage disabled youth by limiting their chances of employment.

Employment opportunities differed between disabled and non-disabled youth (32.9% vs. 13.1%; $p \leq 0.001$). For youths who indicated that they are working (n=193, 22.8 %), the larger proportion of DY (n=28, 57.1 %) indicated an informal type of job, 15 (30.6 %) indicated a formal type of job and six (12.2 %) indicated self-employment. Unemployment was markedly more common among DY than among NDY. The main barriers experienced by disabled youth were associated with poor health (n=162, 47.9%)

followed by lack of jobs in the area (n=123, 36.4%), lack of skills and social attitudes. Lack of job availability (n=142, 62.3%) and lack of skills (n=75, 32.9%) were associated significantly with unemployment among non-disabled youth (Lorenzo and Cramm. 2012/2013, in press) followed by lack of further education and training (n=56, 24.6%). More NDY (n=275, 59%) indicated zero income sources compared to DY (n=119, 22.8 %). DY rely on grants (n = 329, 89,4%), 65.1% NDY earn salaries or wages as their main source of income (Lorenzo and Cramm, 2012, in press). They also found that more DY indicated a combination including salary and grant, salary and self-employed, wage and grant, self-employed and grant and salary, wage and grant.

Discussion

The definition of poverty given earlier in this paper was clearly illustrated in the results. Dube and Charowa's call for structural inequalities to be addressed to alleviate poverty has been vindicated. Education and employment need critical attention. More specifically, the results on education showed that retention of disabled children through the different levels of formal education from early childhood development through to higher education needs to be improved. In addition, the multiple forms of education identified in the African Youth Charter (Panday, 2006) are also proposed in the CBR guidelines on Education component, namely, non-formal, informal, distance learning, and life-long learning. These avenues could be exploited to increase educational access especially through the use of modern information and communication technology. Career guidance also needs to be provided so that disabled youth's aspirations are well informed (Roggero et.al., (2006).

The need for skills development and creation of job opportunities to improve the plight of both disabled and non-disabled youth related to sustainable employment is clearly evident. The CBR guidelines on Livelihoods component provide a range of well tested possibilities from self-employment, entrepreneurship development, employment in the open labour market as well as access to financial resources and social security (WHO, 2010). Van Niekerk (2008) has argued that the high unemployment rate in South Africa should not mask the discrimination against disabled people. Shaw et.al. (2007) recommended the need to look into the job search strategies for disabled youths and eradicate barriers that they encounter in searching for jobs. Many studies have identified the role of intermediaries such as job coaches or occupational therapists to help disabled people and employers to connect and match the skills of the person to the job (Roggero et.al.2006; Engelbrecht and Lorenzo, 2010; van Niekerk et.al. 2011). The Employment Equity Act (DOL, 1998) needs to be monitored more vigorously and institutions and business sector need to be penalised if they are not meeting the target of 2% of workforce being disabled people. Specific attention needs to be focused on committing resources for the implementation of Skills Development Act (DOL, 2010) that address the specific needs of disabled youth. This action will necessitate collaboration between health, education and labour sectors. NEDLAC is in a position to play such a co-ordinating role.

The WHO's community based rehabilitation guidelines provide comprehensive coverage on inclusive development across health, education, employment, social life and empowerment (WHO, 2010). A central component of CBR is the equalisation of opportunities for disabled people, through general community development, rehabilitation, poverty reduction and social inclusion. The guidelines have been field tested in Africa, Asia and South Americas to identify factors that enable participation in development opportunities for disabled people across the life course. They were developed on the principles of the UN Convention on the Rights of Persons with Disabilities (CRPD) (UN, 2006) that the South Africa government ratified in 2008. Civil society organisations therefore have a legal instrument in The UNCRPD with which to monitor the progress made in realisation of equal rights and opportunities for disabled youth. Simultaneous capacity building initiatives for human resource managers in all institutions and organisations also needs to be provided.

The Disability Studies Academic Programme at University of Cape Town is one such initiative that seeks to take specific focused action with disability organisations in order to address the inequities faced by disabled youth to ensure their inclusion in social and economic development to the same degree as their non-disabled peers. The programme has an interdisciplinary approach as it seeks to build capacity of leaders in business, government, civil society and higher education sectors to tackle barriers at the level of policy implementation to ensure inclusive development for all youth. One specific strategy has earmarked the need to redesign curricula of all major disciplines in the faculties of humanities, law, commerce and health sciences so that their future graduates are equipped to provide equal citizenship

for disabled youth in the different fields they work in. The Centres for Higher Education Development and the Institutional Planning Departments at all higher education institutions should also be mobilised to be champions for ensuring disability-inclusive curricula and research.

Conclusion and strategies for action

Disability as a human rights issue needs to be mainstreamed across all sectors that are addressing poverty alleviation. The challenges facing the South African government in terms of service delivery and economic growth are starkly evident in the vulnerability of youth, particularly disabled youth. The overall goals of development will not be achieved if disabled youth are excluded and their rights to full citizenship will be denied.

Five strategic actions are proposed, namely,

1. Self and family advocacy as well as collective advocacy and creating alliances with mainstream youth and development organisations so as to mobilise more resources and opportunities for disability-inclusive development
2. Generate co-operative attitudes and accountability amongst stakeholders to create enabling environments
3. Identify good practice for duplication and up scaling of programmes and disseminate this information widely using information and communication technology.
4. Build a strong evidence-base by documenting effective practice that informs policy processes so as to familiarise government and policy makers with specific inequities faced by disabled youth
5. Produce new knowledge to build capacity of relevant stakeholders to take action related to rights-based approaches that address disability-specific inequities

Acknowledgements

SANPAD, NRF Thuthuka, and URC at UCT for funding this research. Respondents and fieldworkers as well as co-researchers from the five institutions and community organisations.

References

African Union (2006) African Youth Charter. Ethiopia Retrieved March 2012, <http://www.africa-union.org/root/ua/conferences/mai/hrst/charter%20english.pdf>.

Albert B. (2006) Lessons from the Disability Knowledge and Research Programme. Overseas Development Group and DFID: University of East Anglia

Cramm, J. M., Nieboer, A. P., Finkenflügel, H., and Lorenzo, T. (in press, 2012/2013) Comparison of barriers to employment among youth with and without disabilities in South Africa *WORK* (accepted January 2012)

Cramm, J. M., Nieboer, A. P., Finkenflügel, H., and Lorenzo, T. (in press, 2013) Disabled youth in South Africa: Barriers to education *International journal on disability and human development* (IF 0.231 Accepted for publication September 2011)

Dube, A.K. & Charowa, G. (2005). Are disabled peoples' voices from both south and north being heard in the development process? Retrieved May 20, 2008, http://www.disabilitykar.net/research/thematic_voices.html

Lorenzo, T (2011) Aspiring to inclusive development of youth with disabilities in South Africa Paper presented at UNCRPD Conference, Pwani University, Kilifi, Kenya, 16-17 June 2011

Lorenzo, Theresa and Cramm, Jane (in print, 2012) Access to livelihood assets among youth with and without disabilities in South Africa: Implications for health professional education *SAMJ* (accepted February 2012)

Panday, Saadhna (2006) African Youth Charter *HSRC Review* Volume 4, No. 3, September Retrieved March 2012 http://www.hsrb.ac.za/HSRC_Review_Article-34.phtml

Roggero P, Tarricone R, Nicoli M & Mangiaterra V. (2006). What do people think about disabled youth and employment in developed and developing countries? Results from an e-discussion hosted by the World Bank. *Disability and Society*. 21(6): 645-650.

Shaw A, Gold D & Wolfe K. (2007) Employment related experiences of youth who are visually impaired: How are these youths faring? *Journal of Visual Impairment and Blindness*. 101(1)

UN (2006) *Convention on the Rights of Persons with Disabilities* New York: UN

WHO (2010) *CBR Guidelines* Geneva: WHO

Van Nierkerk L. (2008). Participation in work: A human rights issue for persons with psychiatric disabilities. *South African Journal of Occupational Therapy*. 38(1): 9-15.

Yeo (2005) Disability, poverty and the new development agenda. Paper for Disability Knowledge and Research Programme. Retrieved March 2012 http://www.dfid.gov.uk/R4D/PDF/Outputs/Disability/RedPov_agenda.pdf

TWO STEPS FORWARD, ONE STEP BACK: EQUALITY AND SEXUAL ORIENTATION IN SOUTH AFRICA 2009 – 2011

Pierre Brouard: *Deputy Director of the Centre for the Study of AIDS at the University of Pretoria* &
Jimmy Pieterse: *Lecturer in Humanities Faculty of the University of Pretoria*

Introduction

South Africa's democratic transition not only brought an end to formal apartheid, it was also a watershed period for rights around sexual orientation in the country. In 1993, the interim constitution proscribed discrimination on the basis of sexual orientation and endeavoured to protect a right to privacy. These provisions were retained in section 9 of the final Constitution, which outlaws discrimination on the basis of sexual orientation (and sex and gender). This made South Africa one of the first countries in the world to explicitly enshrine into law the rights of people who are identified as gay, lesbian or bisexual, or who practice same-sex sexuality.

These rights were extended in 1998 when the Parliament of South Africa passed the Employment Equity Act, protecting citizens against labour discrimination on the basis of sexual orientation. In the same year, the Constitutional Court ruled that the law prohibiting homosexual conduct between consenting adults in private was unconstitutional. The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) of 2000 further extended rights to public accommodations and services. In 2006, the Parliament of South Africa passed legislation that allows same-sex civil marriages, as well as civil unions for unmarried opposite-sex and same-sex couples. All discriminatory provisions have since been formally repealed, resulting in an equalisation of the age of consent to sex at sixteen and gender-neutral definitions of all sexual offences.²² Yet during the period under review, alarming levels of homophobia and unacceptably high rates of attacks on individuals who were homosexual, or who had a non-normative gender presentation, persisted.

Data on attacks on transgender or intersex people is limited, but as Holland-Muter notes²³, there is a host of anecdotal evidence about transgender people who experience high levels of stigmatisation, discrimination, verbal and physical abuse, and violence that has been reported to Gender Dynamix, a non-governmental organisation (NGO) promoting the rights of transgender people in South Africa.

This chapter has as its primary focus homophobic attitudes, speech and acts, that is, those attitudes and actions towards people who are identified as gay, lesbian or bisexual, or who were assumed to be gay, lesbian or bisexual based on their gender expression, with a core emphasis on so-called "corrective" rape. It also addresses discrimination based on sex and gender, where appropriate. This is because it would be difficult to discuss sexual orientation without acknowledging that anyone who had a non-normative gender expression or an alternative gender identity – this could include gay, lesbian and bisexual people, but also those who were transgendered and intersexed – could be a victim of a homophobic attack. Such an attack could be informed by beliefs in the importance of a rigid gender binary and assumptions that a normative, or stereotyped, gender presentation is a sign of heterosexuality.

Therefore, when thinking of the Equality Clause, it is important to note that the meanings of gender identity (how we feel as male or female) and gender expression (how we present as males or females) intersect with sexual orientation (who we are romantically and sexually attracted to) and sex (our biological characteristics as men and women) in complex ways. This is because some gay, lesbian and bisexual people may not have a normative gender presentation. People who do not have normative gender presentation may be assumed to be gay or lesbian, and people who are intersexed or transgendered may be assumed to be gay, lesbian, bisexual, or vice versa.

²² 'Gay Rights in South Africa': <http://www.queerlife.co.za/test/gay-opinions/3931-gay-rights-in-south-africa.html>

²³ Developing a national agenda for future research on violence against lesbian, bisexual and gender non-conforming women in South Africa. Susan Holland-Muter. GALA 2011

In South Africa, this chapter argues that patriarchy polices heterosexuality in general as well as gay men, lesbian women, bisexual people and indeed anyone with a non-normative gender presentation.

Therefore it is important to locate debates and discussions around discriminatory attitudes, speech and acts in a broader analysis of how patriarchal entitlement, heteronormativity (assumptions that heterosexuality is the default “normality”), heterosexism (discrimination in favour of heterosexuality) and gender normativity are enforced.

Concepts and Definitions

The term LGBTI (lesbian, gay, bisexual, transgender and intersex) will be used when reference is being made to those who experience discrimination based on the (overlapping) phenomena of sexual orientation, gender and sex, otherwise specific mention will be made of the terms gay, lesbian and bisexual to reflect the nuances of discrimination based on sexual orientation.

As noted in a resource on the rights of LGBTI people²⁴, agreement on terms and definitions are needed in order to increase a general understanding of the issues at stake and to improve and address the rights to equality and non-discrimination. The definitions of the terms lesbian, gay, bisexual, transgender and intersex for the purpose of this review are as follows:

- Lesbian – female-identified women who seek, caring, supportive and sexual relationships with other female-identified women, transgender women or intersex women.
- Gay – male-identified men who seek, caring, supportive and sexual relationships with other male-identified men, transgender men or intersex men.
- Bisexual – female-identified women and male-identified men who seek caring, supportive and sexual relationships with other men and women, be they biologically male and female, transgender or intersex.
- Transgender – persons who live as a gender other than the gender assigned to them at birth – whether they have chosen to make use of surgery and/or hormones, or not.
- Intersex – individuals born with anatomy or physiology which differs from contemporary ideals of what is a “normal” male or female.

This reflection on definitions would not be complete without noting that identity labels are contested and political and, for many complicated personal and social reasons, there are individuals who may practice same-sex sexuality but not identify as gay or lesbian. Hence, the terms men who have sex with men (MSM) and women who have sex with women (WSW) have gained some currency²⁵. However, since this review is focused on the claiming of rights, the emphasis will be on people who identify as gay or lesbian, but will not exclude those who are ill-treated even if they do not use or adopt these identity terms.

Finally, the term “black”, as used in this review, will mean all South Africans who are black African, Coloured or Indian, unless it is necessary to make a distinction within the category “black”, for instance where discrimination may vary in different contexts. If homosexuality is seen as “un-African” in some situations, or a hate crime has happened in a particular context, it may be important to foreground race.

Hate crimes, gender violence, and other rights violations

Negative attitudes, words and actions towards LGBTI people can be understood in a number of ways and there is disagreement among researchers and activists about the appropriate lens. The “hate crimes” lens tends to individualise hate speech and actions, focussing on disagreements between specific individuals, with use of the law to act against an individual perpetrator. A “gender violence” lens locates violence against (often) black lesbian women, and indeed violence against anyone who is perceived as a threat to patriarchal heterosexual power and privilege, in a more systematic and

²⁴From Protection Manual For LGBTI Defenders, Protection International 2010.

²⁵From Social Silence to Social Science. Same-sex sexuality, HIV & AIDS and Gender in South Africa. Vasu Reddy, Theo Sandfort & Laetitia Rispel (eds).

structural frame. A “human rights” lens locates prejudice and harmful actions in the language of the attainment of rights and mechanisms of redress for all citizens. Finally, a “socio-political” analysis would suggest it is impossible to explore violence against LGBTI people without factoring in race, class and poverty, discourses around culture and religion, which are arguably informed by “social panic” around sex, sexuality, sexual orientation and gender. As Holland-Muter notes, in her work on violence against lesbian, bisexual and gender non-conforming women in South Africa²⁶:

“Without a common understanding of what the naming and describing of violence against LGBTI communities entail, we will be unable to put forward a research agenda. A clear priority, therefore, would be to map out the various political and conceptual frameworks and perspectives for researching violence against LGBTI communities.”

While these political and conceptual frameworks are not the primary focus of this review chapter, it will nevertheless engage with the different frameworks where it seems appropriate.

The Empowerment Studies

Definitive, quantitative, country-wide studies of rights violations against LGBTI people do not exist. One useful resource, though, is a series of studies conducted under the auspices of the Joint Working Group (a national network of LGBTI organisations in South Africa) over the last few years. Surveys in three provinces (Gauteng, KwaZulu-Natal and the Western Cape) were conducted with local LGBTI organisations between 2002 and 2006. These studies provided a useful geographical mix and also included both urban and rural participants. They revealed a depressing picture: in all three surveys LGBT people (the studies did not look at intersex people) were victims of verbal abuse (including hurtful jokes), physical abuse, sexual assault and/or rape, domestic violence, and attacks on property, and these abuses were suffered by men and women.

Samples from the three provinces were significantly large and generally representative of all race, gender and age variables. The statistical trends were particularly similar in the two provinces of Gauteng and KwaZulu-Natal, where women in general and, black African women in particular, were most at risk of being victims of violent crimes. Again in the two provinces, black African and Indian people were most at risk of being attacked in public spaces like main roads (59%), taxi ranks (49%), malls (45%), bus stop (39%), etc. In the Western Cape, however, it was the Coloured male group that was more at risk of being victims of violent crimes especially in their homes and in pubs or shebeens. Nonetheless, in all the studies, more than 50% of hate victimisation acts were left unreported to the police.²⁷

A fourth study was conducted during 2009-2010.²⁸ As this falls within the time frame of this review, it will be examined in some detail. This study, on same-sex sexuality in the North West Province (NWP)²⁹, explored experiences of sexual abuse, discrimination and violence, along with perceptions of the environment, HIV testing, knowledge of LGBTI rights, mental health and tendency towards suicide. It is a useful barometer of changing levels of prejudice and experiences of discrimination, violence and social exclusion in South Africa, and was a counterpoint to the previous, more urban, studies. The researchers were also interested in the experiences of LGBTI people in poorer contexts.

Most of the participants in this study were young black persons who were still at school or just out of school and unemployed. The largest single group in the sample was made up of young black women and most participants identified as either lesbian or gay. There was a large prevalence of gender non-conformity among the young, black participants, who had mostly disclosed their sexual orientation to at

²⁶ Developing a national agenda for future research on violence against lesbian, bisexual and gender non-conforming women in South Africa. Susan Holland-Muter. GALA 2011.

²⁷ Joint Working Group Hate Crimes Fact Sheet July 2007.

²⁸ The Gauteng study was conducted between 2002 and 2004, the KwaZulu-Natal (KZN) study between 2004 and 2005, the Western Cape between 2005 and 2006 and the North West province during 2009-2010. The Gauteng and KZN studies can be accessed online at www.out.org.za. The first three studies did not focus on transgender or intersex people. The fourth study differs from the previous studies in that it looked at LGBT people from a largely rural background.

²⁹ Baird, H. (2010) Same-sex sexuality in the North-West Province. Community report on outcomes of a research project. Pretoria: UNISA Centre for Applied Psychology.

least one person (also referred to as “coming out”) at a relatively early age, but at the same time actively tried to hide their sexual orientation from the majority of people around them. The coming out of the black participants was mostly a positive experience, as opposed to the white participants, whose coming out usually happened at a later age and was usually a less positive experience. White participants were more likely to be gender conforming, but were less secretive about their sexuality at a later age. The Indian and Coloured women in the study were particularly secretive about their sexual orientation.

Black participants generally felt accepted in the NWP, while white participants tended to feel less accepted. The youngest gender non-conforming participants believed that traditional leaders were accepting but one fact that everybody did agree on was that religion was not accepting of same-sex sexuality, and this was something the white participants in particular felt very strongly about. Participants reported a relatively low incidence of sexual abuse, rape, discrimination and violence. However, there was a higher incidence of discrimination and abuse while the participants were growing up, especially the gender non-conforming participants. Older white women over the age of 36 reported the highest incidence of sexual abuse during childhood.

Most people were aware of their rights under the Constitution, although there was some level of confusion as to exactly what these rights were and how to use them. The mental health of the participants was generally good, although women and young people had a higher likelihood for attempting suicide. Young people were more prone to alcohol abuse than people in the older age categories. Bisexual participants had a largely negative experience in most aspects relating to their sexual orientation and this affected their mental health negatively.

It is difficult to generalise from the NWP findings as they present a mixed picture of some positive change in the external context, but suggest that the internalisation of negative attitudes still has a potentially damaging effect (with suicide and alcohol use standing out as possible consequences). Gender presentation seems to be a new theme in identity politics, and the role of tradition and religion in shaping social attitudes cannot be overlooked. Childhood sexual abuse seemed to emerge as a theme worthy of further investigation, that is, are young people who are gender non-conforming more vulnerable to sexual abuse, and if so, what impact could this have on emotional wellness and healthy sexuality in adulthood?

The NWP findings do not make a clear case, one way or the other, for the impact of being poor and rural on homophobia. However, the work of Graeme Reid³⁰ some years ago in a township outside Ermelo, Mpumalanga, found that young black gay men who were female identified found ways to navigate their way through the maze of heteronormativity. They found acceptance through their work, often as hairdressers, and would enter into relationships with men who were often heterosexually identified. This idea that relationships need to conform to notions of a gender binary suggests the complexity of identity and practice. As Lorway³¹ has shown in his work in Namibia, gender violence is not an unusual consequence, even in same-sex pairings and practices.

While it is difficult to generalise from the Empowerment Studies, and the more qualitative work of others, they do present a complex picture of discriminatory practices, with some evidence of positive shifts, with LGBTI people finding ways to “fit in” and make meaning of their daily lives. Yet, the consequences of past and present abuse and homophobia can linger.

“Corrective” rape

KwaThema is a township near the town of Springs on Gauteng’s East Rand. On 28 April 2008, Eudy Simelani, one of the first women to live openly as a lesbian woman in KwaThema and who played

³⁰ Graeme Reid. How to become a ‘real gay’: identity and terminology in Ermelo, Mpumalanga, *Agenda*, 20:67, 137-145.

³¹ Beyond the new geography of dissident gender-sexual identity categories: Masculinities, homosexualities and intimate partner violence in Namibia. In *The Fourth Wave: Violence, Gender, Culture and HIV in the 21st Century*. Edited by Jennifer Klot and Vinh-Kim Nguyen. UNESCO 2011.

soccer for the national women's team, was found dead. She had been gang raped, beaten, and stabbed twenty-five times in the face, chest, and legs. The NGO ActionAid, and the South African Human Rights Commission, labelled the murder a hate crime,³² and it seemed to signal either the beginning of, or more publicity around, a systematic campaign against black lesbian women, especially those who were gender non-conforming.

In 2009 another lesbian woman, Girlie Nkosi, was stabbed a dozen times in a KwaThema club. This led to the founding of the Ekurhuleni Pride Organising Committee (EPOC), endorsed by religious and traditional leaders. In the same year, EPOC organised a march, attended by 500 people, to raise awareness of LGBT rights. The following year even more people marched, suggesting positive attitudinal shifts.³³

Despite this, two openly lesbian women were murdered in KwaThema around April of 2011. On Easter Sunday, twenty-four year old Noxolo Nogwaza, an LGBTI activist and member of EPOC, was stoned, stabbed with broken glass and gang-raped. Four weeks earlier, the body of twenty-year old Nokuthula Radebe was discovered in the same township. This prompted calls for the classification of "corrective" rape (defined as "rape of a lesbian woman purportedly as a means of 'correcting' her sexual orientation or gender identity"³⁴) as a hate crime and the establishment of a governmental task team, which is described later in this review chapter.

"Corrective" rape is not limited to KwaThema. Cases have been reported from Atteridgeville, west of Pretoria, to Khayelitsha on the Cape Flats. Although gay men and transgender individuals also suffer discrimination and may be victims of sexual assault, lesbian women seem to bear the brunt. According to one source, ten lesbian women per week are raped or gang raped in Cape Town alone.³⁵ According to another, around thirty lesbian women were murdered because of their sexuality between 2003 and 2011, showing a steady increase over the years.³⁶

The ferocity of some of these attacks is not completely fathomable. While the Human Rights Watch report of 2011³⁷ noted that some violence was perpetrated by men who were complete strangers, keen to enforce a woman's "proper" femininity, other reports suggested that it was common for women who have been attacked, violated or killed to be accused of stealing the girlfriends of their attackers.³⁸ Nevertheless, both these explanations suggest that an analysis around "a crisis of masculinity" is at least partly useful. Symptoms of this crisis include high rates of alcoholism and suicide among men and the constant rise in gender-based violence, with men usually being the perpetrators, and women the objects of violence. These symptoms, it has been argued, arise out of changes in the gendered nature of work (with more women entering the labour market), the reorganisation of gender relations (where more and more women live in single sex households), and changing systems of relating between men

³² According to the Joint Working Group (JWG) hate crime "involves either speech or action that may or may not constitute a criminal offence that occurs when a perpetrator targets a victim be it an individual, their property or an organisation of individuals, specifically because of their actual or perceived identity, be it race, religion, sexual orientation, gender identity, ethnicity, disability or political affiliation or any other similar factor or any combination of these factors." (<http://www.jwg.org.za/>)

³³ D. Bryson, 'Only a Matter of Time Before Next 'Corrective Rape'', *Mail & Guardian Online*, 11 May 2011: <http://mg.co.za/article/2011-05-11-only-a-matter-of-time-before-next-corrective-rape>

³⁴ The term is put in inverted commas, because it is a misnomer. See: M. Judge, 'Changing the Language of Prejudice', *Mail & Guardian Online*, 12 June 2011: <http://mg.co.za/article/2011-06-12-changing-the-language-of-prejudice>

³⁵ D. Smith, 'South Africa Gay Rights Activists Warn of Homophobic Attacks After Murder', 3 May 2011: *The Guardian Online*: <http://www.guardian.co.uk/world/2011/may/03/south-africa-homophobic-attacks>

³⁶ D. Bryson, 'Only a Matter of Time Before Next 'Corrective Rape'', *Mail & Guardian Online*, 11 May 2011: <http://mg.co.za/article/2011-05-11-only-a-matter-of-time-before-next-corrective-rape>

³⁷ "We'll Show You You're a Woman". Violence and Discrimination against Black Lesbians and Transgender Men in South Africa. Human Rights Watch, 2011.

³⁸ 'Lesbian Woman Stabbed by Men Accusing Her of Stealing Their Girlfriends', *Sowetanlive*, 14 June 2011: <http://www.sowetanlive.co.za/news/2011/06/14/lesbian-woman-stabbed>

and women (a greater sense of entitlement in women to social, economic and legal equality), against a backdrop of persistently high levels of unemployment which disproportionately affect young black men.³⁹ The attainment of the markers of socially-accepted manhood, undermined since colonial times, has thus become very difficult for most young township inhabitants. Angry, emasculated young men, it has been argued, scapegoat and vent their frustration on lesbian women, because they are far easier targets than the larger social and structural forces responsible for their frustration. When these women do not conform to a stereotypical gender presentation, they are an easier target for male anger and control. As the Human Rights Watch report on violence against black lesbian women and transgender men noted⁴⁰, we need to “understand abuse and gender-based violence in a broader context of discrimination and disadvantage”.

Rape rhetoric may also be influenced by consumer culture and the objectification of women; literally for the purpose of male consumption. Successful businessmen who eat sushi off naked women are idolised.⁴¹ Julius Malema’s verbal attack on Jacob Zuma’s rape accuser⁴², and John Qwelane’s promotion after homophobic remarks in the media⁴³, suggest that a “masculinist” culture is thriving. This, according to lesbian activist Melanie Judge, “creates a context in which the rape of lesbians can be legitimised.”⁴⁴

This analysis around masculinity (or, more appropriately, masculinities, as not all men are gender oppressors or perpetrators of gender violence) does not tell the whole story. Social norms, which declare same-sex identities and practices as unacceptable, beliefs that these are “un-African”, and conservative religious views which declare homosexuality to be sinful and punishable, if not in this life then certainly the next, contribute to negative discourses and actions. When media portrayals and reports fail to challenge stereotypes, or when homophobia is given a popular and unchallenged voice, an enabling space may be created for men to feel they can act with impunity.

These reactionary impulses seem to have taken particular hold in poorer and less-resourced communities, where economic anxiety is inextricably linked to social and moral uncertainty, against the backdrop of a crisis of “masculinity” and gender struggles, as noted above. Fears that the “moral fabric of society” is unravelling, that “tradition” is being rolled back, and a resurgent patriarchy and cultural “nostalgia”, have advanced conservative moral and religious agendas.

It can be argued that only individuals fortunate enough to be part of the middle and upper classes of South African society can effectively access the protection afforded LGBTI people by the law. Indeed, the reported incidence of violent homophobic attacks and especially “corrective” rape has been highest

³⁹ G. Reid & L. Walker (Eds.), *Men Behaving Differently: South African Men Since 1994*, (Cape Town: 2005)

⁴⁰ “We’ll Show You You’re a Woman”. Violence and Discrimination against Black Lesbians and Transgender Men in South Africa. Human Rights Watch, 2011. Page 2

⁴¹ In an act of conspicuous consumption to mark his fortieth birthday in 2011, businessman and club-owner, Kenny Kunene had sushi served on near-naked models to guests at his Sandton club, ZAR. The party reportedly set Kunene back in the order of R75 000,00. He was roundly condemned for objectifying women.

⁴² In January of 2009 ANC Youth League President, Julius Malema suggested that the woman who accused ANC president Jacob Zuma of rape had had a “nice time” with him. Addressing 150 Cape Peninsula Technicon students, Malema asserted that when “a woman didn’t enjoy it, she leaves early in the morning. Those who had a nice time will wait until the sun comes out, request breakfast and ask for taxi money.” The NGO Sonke Gender Justice took Malema to the Equality Court over his statements. The court found in favour of the NGO: Malema was fined R50 000,00 and instructed to make a public apology.

⁴³ On 20 July 2008, Jon Qwelane wrote an article for the Sunday Sun newspaper that appeared under the headline: “Call me names, but gay is NOT okay.” In it Qwelane asserted that should gay marriages be permitted it would not be long before bestiality was also legalised. The press ombudsman received nearly 1 000 complaints in response to the column. Not long thereafter Qwelane was appointed as South Africa’s ambassador to Uganda (where homophobia is rampant and gays and lesbians are actively persecuted).

⁴⁴ M. Judge, ‘Changing the Language of Prejudice’, *Mail & Guardian Online*, 12 June 2011: <http://mg.co.za/article/2011-06-12-changing-the-language-of-prejudice>

in the poorest communities. The Human Rights Watch report noted that *“The economic and social position of lesbian, gay, bisexual, or transgender people in South Africa have a significant impact on their experience.”* Those who are able to afford a middle-class lifestyle may not experience the same degree of prejudice and discrimination on the basis of sexual orientation. However, for those who are socially and economically vulnerable, the picture is often grim.⁴⁵

Poor access to justice and other resources complicate this picture, and along with religious, cultural and social prejudice, facilitates violence against lesbian women. This explains why activists have argued that the law on its own is not enough to address this phenomenon. Melanie Judge warned that an answer to the crude and vulgar chauvinism that characterises violence of a gendered nature was not to be found in statutory bodies, strategic initiatives, policing, courts, or policy and legal frameworks alone. Rather, it ultimately resides in *“public opinion that will drive out from public life those who perpetuate such exclusionary views, incompatible with the spirit of the Constitution.”*⁴⁶ Some of this could be said to have happened in the wake of Eudy Simelane’s death.

In September 2011, the Eudy Simelane murder case returned to the Delmas court for final arguments and judgment of the three men standing trial for her rape and murder. In October 2011, the case of a Cape Town woman, Zoliswa Nkonyana, who was murdered in 2006, finally drew to a close when four men were convicted – they had stoned, kicked and stabbed the 19-year-old, who had lived openly as a lesbian woman.

According to the JWG it *“is ironic that both cases return to court within a short time of the reports ... relating to the new National Interfaith Leadership Council and its plans to roll back progressive legislation affecting Lesbian, Gay, Bisexual, Transgender and Intersex people ... It is obscene that at a time when LGBTI people are facing ever increasing levels of abuse and violence at the hands of society, anyone would suggest removing what legal and constitutional protection does exist.”*⁴⁷

Hate speech

South Africa does not have specific hate crimes legislation, although the Hate Crimes Working Group, a coalition of civil society organisations and other interested parties looking at crimes based on race, nationality, sexual orientation, gender identity, religion, mental or physical disability and ethnicity or language group, proposed a Hate Crimes Bill in 2010. Currently, victims of hate crimes, over and above legislation covering assault etc, might use the Promotion of Equality and Prevention of Unfair Discrimination Act to seek some form of redress, as this allows a complainant to bring a case should they be able to prove some form of systematic discrimination on the basis of any ground in the Equality Clause.

One such high profile case has already been highlighted, that of Jon Qwelane, now South African ambassador to Uganda, who wrote about homosexuality in the Sunday Sun in 2008.⁴⁸ He was found guilty of hate speech by the Johannesburg Equality Court in May 2011. The court found that a cartoon in his column amounted to hate speech, and that both his article and the cartoon propagated hatred and harm. Qwelane was ordered to make an unconditional apology to the gay and lesbian community, and pay R100 000 to the South African Human Rights Commission. Qwelane subsequently appealed this decision, though it must be said this was on procedural grounds rather than on the facts of the case. The South African Human Rights Commission was also ordered to pay costs (Case number 44/2009EQ JHB).

Shifting attitudes?

Surveys on attitudes to sexuality provide a useful insight into whether, and at what rate, attitudes around

⁴⁵ “We’ll Show You You’re a Woman”. Violence and Discrimination against Black Lesbians and Transgender Men in South Africa. Human Rights Watch, 2011. Page 2

⁴⁶ M. Judge, ‘Changing the Language of Prejudice’, *Mail & Guardian Online*, 12 June 2011: <http://mg.co.za/article/2011-06-12-changing-the-language-of-prejudice>

⁴⁷ The Joint Working Group, ‘JWG Calls for Justice in Hate Crimes Cases in September’, Accessed 28

⁴⁸ <http://www.news24.com/SouthAfrica/News/Jon-Qwelane-guilty-of-hate-speech-20110531>

sexual orientation and gender identity are changing. According to a Human Sciences Research Council (HSRC) report, which analysed attitudes to homosexual behaviour over the previous five years, derived from the South African Social Attitudes Survey (SASAS), there was some evidence of more positive attitudes and a decline in the intensity of prejudice in the country. Although the report was released in 2008, prior to the period under review, it nevertheless suggests a starting point for an analysis of whether social attitudes can and do shift.

Gay and lesbian identities continued to be characterised as “un-African”. The assertion of “un-Africanness”, said the report, “conceals a moral and cultural view that African societies are somehow unique and therefore immune to what is perceived to be a Western and European import. The systematic accusations by several African leaders have fuelled these perceptions and South Africans are likewise divided in their tolerance of same sex issues.” Robert Mugabe of Zimbabwe, Yoweri Museveni of Uganda, Sam Nujoma of Namibia, and more recently Bingu wa Mutharika of Malawi have all repeatedly declared their distaste and abhorrence for homosexuality and commented on its “un-Africanness”. Museveni once noted that “I hear European homosexuals are recruiting in Africa” and Mugabe has commented that “gays are worse than pigs and dogs” and that homosexuality was inconsistent with African and Christian values.

Negative attitudes towards lesbians and gay men were widespread, said the HSRC report. Overall, more than 80% of the population aged 16 years and above expressed the view that sex between two men or two women could be considered “always wrong” in each of the five survey years. At the national level, there appeared only to have been minor changes over the period.

An examination of gender differences in the South African data suggested that, in total, there was not a pronounced divergence, but age affected attitudes towards homosexuality, with older South Africans moderately more intolerant than younger adults. Prejudiced views on same-sex relations appeared closely related to education, with more highly educated people being more tolerant. Those who had matriculated or possessed a tertiary qualification demonstrated more liberal views, especially compared to citizens who either had no formal schooling or only a primary-level education. This was a constant trend across the five years. However, even among tertiary-educated adults, 76% on average over the period considered homosexuality to be always wrong.

The South African data produced ambiguous evidence on the relationship between religious affiliation and attitudes. Respondents belonging to denominations such as the Zion Christian Church and religions such as Islam appear to have marginally more entrenched negative views, while practising Anglicans and Hindus emerge as more positive. Yet, virtually none of the differences between denominations were statistically significant, which may reflect the narrow range within which the attitudes to homosexuality vary.

The report found a small racial gradient of difference in tolerance of homosexual behaviour. Black African South Africans tended to report higher levels of disapproval than white and Coloured South Africans in most of the five survey rounds. These differences were statistically significant. Attitudes also differed according to geographic location. Most negative attitudes were found in rural areas – among those living on commercial farms and in communal areas – while fewer negative attitudes were observed in formal urban areas. This pattern was consistent over the five-year window. Furthermore, residents of larger urban centres had significantly fewer negative attitudes than those in the communal rural areas.

Based on these findings the authors concluded that:

- South African society is still largely prejudiced rather than accepting of same-sex relations and that cultural prejudice remains strong.
- While a rights-based model governs citizenship claims in the country, attitudinal changes do not necessarily correlate with rights.
- Reluctance to “accept” homosexuality could also be linked to levels of education and awareness of people, the rural-urban divide, age, culture, and religion.
- Tolerance and positive attitudes may have something to do with the recognition of difference, equality and dignity, which are values that arise out of a slow process of negotiation.

- Rights do not necessarily result in justice and the work of public education around diversity (which will include understanding same-sex issues) should not only be the responsibility of LGBTI organisations, but rather the responsibility of all South Africans, perhaps to be included in life orientation curricula in schools.

A recent publication on the lives of young LGBTI people in South Africa found that “*young LGBTIs are exposed to the same challenges as most South African youth – but these are made worse by continuing homophobia at home, at school, in churches and in society at large, despite the social changes of the recent past.*” It went on to say that while young LGBTI people “*continue to experience isolation and are prone to disproportionate rates of mental illness, suicide, and alcohol and drug abuse, when compared to heterosexual youth a positive feature of the period since 1994 has been the growth of an organised LGBTI community and organisations that provide safe spaces, support and services to young LGBTIs. Youth LGBTI groups are emerging on university campuses, and in townships and rural towns around the country. A new landscape is emerging, in which the post-apartheid LGBTI generation can live more fulfilled lives.*”⁴⁹ In a 2010 review of the LGBTI sector more broadly, the same authors concluded that: “*in the past four years, homosexuality, bisexuality, transgender and even intersex have become part of the psyche of our society. People may not like it and they may still tell the HSRC that they abhor it, but the psycho-social evidence that people’s discomfort with cognitive dissonance, with being forced to accept in their behaviour what they not accept in their beliefs, pushes them to change those beliefs, seems to be working here too.*”⁵⁰

The authors of the review are quick to acknowledge that the battle is far from won and that there “*will still be hate crimes, but there are also those who tell you that ‘some of my best friends are gay’.* Nevertheless, as long as we live in a society so marked by income disparities, a society in which the haves and the have-nots are so far apart, people will look for scapegoats and anyone who is marginalised is an easy scapegoat. The brunt of this falls on the poor not on the middle-class and that is why, while the Constitution and the changing legislation is important, the need for service delivery and resource access is a challenge for all of us.”⁵¹

It seems fair to say, then, that while there are shifts, a homophobic culture still pervades South African society. Sexual rights in the Bill of Rights are contested, disputed and resisted by a large proportion of ordinary citizens; conservative religious and patriarchal discourses articulate in such a way that “*real*” black African women are defined in opposition to lesbians, commercial sex workers, transgender and gender non-conforming women; prejudice and resultant homophobic violence are sanctioned by the actions (and inaction) of politicians; and systems of power based on patriarchy serve to legitimise heteronormative categories of sexuality, while at the same time invalidating and vilifying non-conformist versions thereof.⁵²

Political commentator Eusebius McKaiser has argued that we have to “*urge government to display greater visible, public leadership in a broader social dialogue about attitudes towards sexual minorities*” if we are to see a positive change in attitude on the part of the homophobic majority.⁵³

Yet, it is not as though our national government shirked its obligations to eliminate discrimination and violence on the basis of sexual orientation and to champion the rights of sexual minorities. Indeed,

⁴⁹ M. Nell & J. Shapiro, *Out of the Box: Queer Youth in South Africa Today*, Report commissioned by Atlantic Philanthropies, July 2011.

⁵⁰ M. Nell & J. Shapiro, ‘The Atlantic Philanthropies LGBTI Cluster South Africa: Assessment of Strategy; Preparing the Ground for Legacy Outcomes 2010’, Report prepared for the Atlantic Philanthropies (2010).

⁵¹ M. Nell & J. Shapiro, ‘The Atlantic Philanthropies LGBTI Cluster South Africa: Assessment of Strategy; Preparing the Ground for Legacy Outcomes 2010’, Report prepared for the Atlantic Philanthropies (2010).

⁵² M. Nell & J. Shapiro, ‘Living Dangerously: Riding on the Cusp of the Human Rights Wave; Making Lesbian, Gay, Bisexual, Transgender and Intersex Rights a Reality in Southern Africa’, Report Commissioned by Atlantic Philanthropies (2009).

⁵³ E. McKaiser, ‘Make Sexual Minorities Mainstream’ *Mail & Guardian Online*, 27 May 2011: <http://mg.co.za/article/2011-05-27-make-sexual-minorities-mainstream>

South Africa has taken steps to combat homophobia and homophobic violence; both locally and internationally, even if these steps were seen by some as inadequate.

Responses to infringements of rights: Localised organisation around “corrective” rape

Eudy Simelane’s murder galvanised an enraged the KwaThema community, the members of which took steps to reclaim the area as a safe space for all its residents. The first of these steps were taken at grassroots level. Around 1500 people attended Simelane’s funeral and more than 300 attended her memorial service. In excess of 100 people slept outside the Delmas Court the evening before her trial was held, while 400 attended. Community members showed solidarity by organising and taking part in a neighbourhood cleanup to make it a safer and friendlier environment.⁵⁴ In addition, people started to pay attention to the links between problems faced by the LGBTI community and problems caused by poverty. And they organised to counteract it. The work of the Equality Project in KwaThema, for instance, started “turning the horrific hate crime of Eudy Simelane’s murder into a community building process.” Such work is tedious and slow, however, and it is a mammoth task to replicate in hundreds of townships around South Africa. The issues being faced are huge, and cannot be confined to LGBTI communities.

National LGBTI responses

In their review of the LGBTI sector, Nell and Shapiro⁵⁵ noted that LGBTI organisations that understand the importance of political advocacy, are beginning to test how welcome their endeavours, and how strong their alliances, are. Many have focused on both service delivery as well as advocacy around rights in general, and the rights for LGBTI people in particular, in the broader frame of celebrating the notion of a diverse citizenry enshrined by the Constitution. Some successes in the LGBTI sector, both in its organisation and in its response to rights infringements, include:

- Greater inter-organisational collaboration.
- The spread of organisations (both large and small) and the effectiveness of donors working together to strengthen the sector (though it must be said that international funding for the sector is declining and uncertainty remains about the near future of LGBTI work).
- Improved service delivery and, in some sectors, mainstreaming of that service delivery through research and joint action.
- The growth in profile, capacity and leadership among black lesbians.
- Comprehensive and informed coverage by the media of LGBTI issues and the growth and reach of Behind the Mask as a pan-African web-based information dissemination tool in particular.
- Favourable court rulings.
- Steady delivery of services and development of models of service delivery that can be mainstreamed.
- The emergence of a both historical and present-day account of African homosexual life, challenging “un-African” myth.
- An opened space for progressive faith-based organisations to sow their seeds more widely.

In March 2011, the Rape Crisis Cape Town Trust and the Triangle Project, on behalf of signatory LGBTI organisations, made the following points in a press statement, after a meeting on hate crimes with the Minister of Justice and Constitutional Development, Jeff Radebe for the following temporary measures to be taken to protect the rights and interests of LGBTI persons.⁵⁶

1. That the South African Police Service, Department of Justice and Constitutional Development and National Prosecuting Authority (NPA) monitor hate-crime cases in the criminal justice

⁵⁴ M. Nell & J. Shapiro, ‘Living Dangerously: Riding on the Cusp of the Human Rights Wave; Making Lesbian, Gay, Bisexual, Transgender and Intersex Rights a Reality in Southern Africa’, Report Commissioned by Atlantic Philanthropies (2009).

⁵⁵ M. Nell & J. Shapiro, ‘The Atlantic Philanthropies LGBTI Cluster South Africa: Assessment of Strategy; Preparing the Ground for Legacy Outcomes 2010’, Report prepared for the Atlantic Philanthropies (2010).

⁵⁶ <http://www.triangle.org.za/news/2011/03/meeting-with-minister-on-hate-crimes>

system from when the case is reported to the South African Police Service until sentence is handed down to ensure, inter alia, that the criminal justice system does not re-victimise or re-traumatise the complainant, that investigating officers properly investigate cases, that prosecutors fulfil their duties and execute their duties with a high level of skill and diligence and that criminal trials are finalised without unreasonable delays.

2. That rape cases based on race, gender, sex, sexual orientation and/or sexual identity be heard in the designated sexual offences courts.
3. That the NPA keeps disaggregated statistics of the number of alleged hate crime cases that they decline to prosecute, the number of hate crime cases that are withdrawn by complainants and the number of convictions of perpetrators of hate crime.
4. That the NPA develops a directive for prosecutors to: raise hate crime as an aggravating circumstance to oppose bail; raise hate crime as an exacerbating factor for sentencing; and advise complainants of the right to apply to court to not have the trial conducted in open court, in terms of section 153 (1) of the Criminal Procedure Act 51 of 1977.
5. That Parole Boards view the commission of a hate crime as an aggravating factor for the consideration of the perpetrator's parole application.

While acknowledging that the criminal justice system suffered a range of systemic failures, which adversely affected the majority of complainants irrespective of the nature of the crime, the statement called for special measures to be taken in hate-crime cases on the basis that LGBTI persons constituted a marginalised group or category of persons in terms of the Constitution.

One of the consequences of this initial meeting was the setting up, by the state, of a task team to address hate crimes against LGBTI people (see below).

The State

As a sign of its commitment to LGBTI rights domestically, on the 17th of June 2011, the South African government tabled a resolution at the United Nations calling for a global study outlining acts of violence and discrimination committed against LGBTI individuals, with recommendations on how to put an end to such abuses. The resolution was adopted by a vote of 23 countries in support, with 19 against and three abstentions.⁵⁷ More recently, Health Minister Aaron Motsoaledi gave a keynote address at a conference focussing on sexual-health matters affecting MSM in the context of the HIV and AIDS epidemic⁵⁸, and following the murder of Noxolo Nogwaza, the Justice and Constitutional Development Ministry set up a task team to address hate crimes against LGBTI people. According to Ministerial spokesman, Tlali Tlali, it would be comprised of six representatives from the Judiciary, the Police and Social Development, and six from the LGBTI sector.⁵⁹ To allow for broader representation, four seats were added to the six originally allotted to civil-society organisations. Government representation was also extended to include the departments of International Relations and Cooperation; Women, Children and Persons with Disabilities; the National Prosecuting Authority and; the Legal Aid Board. Two representatives from Chapter Nine institutions were also included. Deliberations began with a focus on "corrective" rape, but the scope was broadened to include other prejudice-based crimes, such as xenophobic attacks and race-based incidents.⁶⁰

The task team has been establishing its terms of reference as well as designing a comprehensive national intervention plan.⁶¹

⁵⁷ United Nations, *UN Adopts Groundbreaking Resolution Affirming that LGBT Rights are Human Rights* (Geneva: 17 June 2011).

⁵⁸ E. McKaiser, 'Make Sexual Minorities Mainstream' *Mail & Guardian Online*, 27 May 2011: <http://mg.co.za/article/2011-05-27-make-sexual-minorities-mainstream>

⁵⁹ Z. Rossier, 'Task Team to Tackle Gay Hate Crimes', *Health24*, 5 May 2011: http://www.health24.com/sex/Gay_lesbian_bisexual_issues/1253-2462,62673.asp

⁶⁰ Civil Society Update on Task Team, *Civil Society Update on Task Team to Address Gender-Based Violence Against Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) People*, September 2011.

⁶¹ "We'll Show You You're a Woman". Violence and Discrimination against Black Lesbians and Transgender Men in South Africa. Human Rights Watch, 2011. Page 33.

The government identified the following short term strategies: the development of a public awareness and communication strategy; training interventions; referrals to specific complaints to justice, crime prevention and security cluster partners, which include specific cases to be investigated by the police, specific cases to be prosecuted by the National Prosecuting Authority, and specific cases in courts; the development of a situational analysis to determine victims' needs, leading to the development of strategies; initiatives to develop a statistical understanding of cases; the provision of shelters for victims; the support of children, families of survivors and victims; the development of a legislative intervention plan; and the development of a multi-sectoral approach.

The following medium-term strategies were identified: presentation of a developed intervention plan; the development, implementation and monitoring of policy; promoting the use of Equality Courts; intensified implementation of the Victims Service Charter; and recommendations to the judiciary. The long-term strategic goal was to forward written submissions for possible amendment of legislation to the relevant departments.⁶²

Conclusion

Gay, lesbian and bisexual people and LGBTI alliances more broadly, have, through activism and organisation, taken giant strides towards ensuring equality for their members before the law. However, we live in a very unequal society and only the fortunate are in a position to make full use of their rights. Like most of their fellow South Africans, the majority of LGBTI people are subject to the daily grind of poverty, and find themselves in a socio-economic and politically-marginal position. But given their sexual orientation and/or non-normative gender expression or preferred gender identity, they are oftentimes the marginal of the marginal. As we have seen, it is a knee-jerk reaction to make scapegoats of members of such groups and to blame them for all of society's problems.

In the face of de-industrialisation, large-scale job losses and rampant unemployment, grinding poverty, resurgent patriarchy, poor education, and poor and non-existent service delivery, LGBTI communities are increasingly finding themselves in the most precarious of positions. Despite activism and political lobbying, this state of affairs is threatening the hard fought equality rights LGBTI movements and communities have won since South Africa's democratic transition.

In order to foster acceptance and ensure equality, societal attitudes will need to be shifted, and this implies mobilisation and transformation, not just reformation – extending well beyond issues normally seen as affecting only LGBTI individuals and communities.

Recommendations

To transform society with the aim of making equality a reality for all is clearly an ambitious and long-term project. Nevertheless there is much that can be achieved with a multi-sectoral and multi-level approach. Apart from the initiatives noted above, the following recommendations seem appropriate.

1. At the individual level, it is important to create a cadre of LGBTI activists who are confident, informed and politically engaged. They act as role models for other LGBTI people, especially the youth, and challenge attitudes and perceptions held by the rest of society. The cadre of activists is especially important in poorer and less-resourced communities, what could be called the coalface of daily discrimination. In addition, support for individuals to bring forward cases of hateful speech and actions are important – test cases have value but those bringing them need ongoing assistance.
2. At the social level, stigma and discrimination need to be challenged in all institutions of influence (in schools, faith-based organisations, cultural bodies and the media), locating this work in a social-justice framework and the values of the Constitution. Discourses around sex, sexuality, sexual orientation and gender need to be examined and opportunities created for the promotion of a national discussion around rights, development and sexual and gender justice.
3. At the systemic level, there needs to be a well funded and supported LGBTI sector, as well as alliances between LGBTI organisations and all other human rights organisations and defenders. All government departments (but especially those representing the criminal justice

⁶² Civil Society Update on Task Team, *Civil Society Update on Task Team to Address Gender-Based Violence Against Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) People*, September 2011.

system) need to be held to account by, and work with, NGOs and rights defenders (including Chapter Nine institutions), and commit to processes and policies, which uphold the laws of the country. Social upliftment programmes, and economic policies which build a more equal society, can address the grinding poverty, which enables some of the excesses of discriminatory practice.

4. Training of the civil service on issues around diversity, commitment to building greater consensus within government about the value of addressing LGBTI rights, and a meaningful commitment to an inclusive national identity, can help make the Equality Clause a reality rather than an ideal.



CONCLUSION

The South African Human Rights Commission is obligated by law to produce reports, which it then submits to the National Assembly for consideration and implementation where applicable. In carrying out its mandate of promoting, protecting and monitoring the observance of human rights in the country, the Commission is also mandated by legislation, to work in close liaison with relevant institutions, bodies and authorities, ensuring that the information contained in its reports does not rely exclusively on expertise found within the Commission. In producing this report and commentary on the state of equality in the relevant period, the Commission utilized a creative approach, in which experts in the different fields were called upon to report on the latest developments within their specific areas of work. The Commission accepts that the concept of 'expertise' at any given point in time, and within any given field is not singular. It is in fact the plurality of voices and experiences which, it is hoped this report and commentary will unleash. We believe that producing a report as we do with this one, marks both a beginning of a discussion and a contribution to the ongoing discourse on human rights, both in South Africa and its elsewhere. The ensuing discussion refers to the contents of the specific chapters contained in this report, while at the same time it attempts being forward looking, offering recommendations for consideration and discussion.

In the past, the Commission produced two substantial reports on the investigation of racism, one on the investigation of racism in the media, and the other one on the investigation of racism in schools. In both these reports the overall finding was that there were indeed manifestations of racism in these sectors, even as discourses trying to defend against these findings emerged. South Africa stands out as a shining example in the world, precisely because its successes as a member of the international community are founded on the history of racial atrocities first carried out during the colonial era, and then during apartheid. That the people of South Africa have managed to triumph over these is a commendable achievement. However, the caption below, delivers a sobering message both for South Africa and the world at large:

The United Nations has been successful in the elimination of such institutional forms of racial discrimination as colonialism and apartheid. Nevertheless, racism, racial discrimination, xenophobia and all kinds of related intolerance have not disappeared. They persist in the new century and, as declared by *A Vision for the 21st Century*, they are rooted in fear, fear of what is different, fear of the other, fear of the loss of personal security. The horrors of racism – from slavery to the Holocaust, to apartheid, to ethnic cleansing - are still with us in various forms (Symonides, 2001)

Depending on one's positionality vis-à-vis the occurrence of racism, there are different views on the extent to which racial discrimination is still a problem in the country. Incidents concurring with the caption above, and suggesting that indeed racial discrimination is still a major problem abound. The report depicts two of such incidents, using these to comment on the need for anti-racism efforts to focus both on individual actors and institutions which still allow for the emission of acts and behaviour which are motivated by racial hatred. The Skierlik shooting and the incident at the University of the Free State are only examples of a lot of incidents, most of which go unnoticed by authorities, and unreported by victims. The compromised functioning of Equality Courts in the country, and the ongoing delay in developing and adopting a national action plan to combat racism, racial discrimination, xenophobia and related intolerance can only be viewed as impediments against efforts to combat racism and provide respite for victims of discrimination.

The most pertinent conclusion, which the chapter on gender equality makes, is that both the private and public sectors are failing to achieve gender equity in the workplace. This conclusion does not lose sight of the fact that there are commendable efforts, which have been put in place both in these sectors. However, implementation thereof is reported to be 'patchy', and inconsistent. Most crucially, the CGE emphasizes what seems to be the resistance of employers to appoint Gender Focal Person at management level, which resistance affects the mainstreaming of gender equity in the workplace. Amongst the recommendations which this chapter makes is that the National Gender Machinery needs to be strengthened, to ensure that gender equality does not only remain an ideal contained in legislation, but absent in the everyday lives of South Africans. As part of the required strengthening, the Commission for Gender Equality recommends that the CGE be strengthened to make legally binding

interventions improving rates of compliance with its findings and recommendations. Given the centrality of employment equity and the challenges facing gender equality as an aspect of achieving equality in the workplace, the CGE recommends that there be an urgent discussion between all the relevant role-players on how to ameliorate this situation.

The chapters on disability bring to bold relief the fact that South Africa has made commendable strides in prohibiting discrimination on the basis of disability, and in putting measures to promote equality in society. However, these chapters concur with all the other contributors, in stating that implementation tends to lag policy and legislative development. More specifically, these chapters highlight the challenges, especially social challenges, which people with disability face on a daily basis, in trying to assert their right to being treated as equal members of our society. Amongst these challenges, are those relating to the ignorance and lack of skill of those providing services, stigma and discrimination and what seems to be resistance against putting in place resources, which will enhance the ability of people with disabilities to lead a normal life. The provision of social grants for people with disabilities although commendable, is rooted in a history of racial discrimination that still affects its implementation. Part of the dynamic involved in providing social grants to people with disabilities is the high level of poverty and unemployment in South Africa, resulting in the social grant being used for subsistence for the whole family of the person with a disability. These chapters also commend the contribution that South Africa made towards the development of the United Nations Convention on the Rights of Persons with Disabilities. The challenges, which are listed above, as well as the importance to focus on providing opportunities for young people with disabilities as well, require emphasis in promoting equality for people with disabilities.

As indicated in the introduction, the rationale behind including a chapter on the challenges faced by the LGBTI community in South Africa was that this sector was facing increasing levels of violence in society, including being murdered. The Human Rights Watch Report, which brought this phenomenon to the attention of the relevant authorities and the government states thus:

This report focuses on black communities because reports of violence against LGBT communities in the media and through the accounts of LGBT rights organizations over the last two decades suggest that black lesbians and transgender men, particularly those living in townships, peri-urban and rural areas, and informal settlements, may be the most marginalized and vulnerable members of the South Africa's LGBT community (Draft Report, p. 9).

With this context in mind, it is clear that the Commission would be remiss in producing a report commenting on the achievement of equality in the country, without including this pertinent aspect of discrimination. According to this chapter, South African society is still largely prejudiced rather than accepting of same-sex relations and cultural prejudice remains strong. Attitudes remain a major challenge even as members of the LGBTI community are accorded the same rights as everyone else in the country. This chapter raises a point that reluctance to "accept" homosexuality could also be linked to levels of education and awareness of people, the rural-urban divide, age, culture, and religion. There is a need to focus on efforts to change attitudes, and recognition that as legislative changes occur members of society do not always change apace with these changes. This remains an aspect of discrimination, which requires more attention and resources.

All in all, efforts to attain equality are ongoing, buoyed by the commitment of all the relevant role-players particularly in bringing about legislative changes to promote equality and to prevent unfair discrimination. In the life of a constitutional democracy, vigilance is required, to ensure that constitutional rights become part of the everyday lives of members of our society. This report is a contribution towards such vigilance and discourse. Although it represents more of a commentary, it is hoped that it also represents a reference point for future equality reports, once the relevant regulations and resources have been put in place.

SAHRC CONTACT DETAILS

Tel: (+27) 11 877 3600 Fax (+27) 11 403 0625 info@sahrc.org.za

Eastern Cape:
Tel: (+27) 43 722 7828
Fax: (+27) 43 722 7830

KwaZulu-Natal:
Tel: (+27) 31 304 7323
Fax: (+27) 31 304 7323

Northern Cape:
Tel: (+27) 54 332 3993
Fax: (+27) 54 332 7750

Free State:
Tel: (+27) 51 447 1130
Fax: (+27) 51 447 1128

Limpopo:
Tel: (+27) 15 291 3500
Fax: (+27) 15 291 3505

North West:
Tel: (+27) 14 592 0694
Fax: (+27) 14 594 1089

Gauteng:
Tel: (+27) 11 877 3750
Fax: (+27) 11 403 0668
086 646 6055

Mpumalanga:
Tel: (+27) 13 752 8292
Fax: (+27) 13 752 6890

Western Cape:
Tel: (+27) 21 426 2277
Fax: (+27) 21 426 2875